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No. 09-

IN THE
Supreme Court of the United States

MR CRESCENT CITY, LLC, MCCRARY CRESCENT CITY, LLC, MICHAEL C. MCCRARY

Petitioners

v.

DOUGLAS S. DRAPER, WILLIAM J. MURPHY

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a federal court prohibited from imposing costs and expenses, including attorneys' fees, under 28 U.S.C. § 1447(c) against an attorney who was counsel in a wrongful removal of a state court case to federal court?

PARTIES TO THE PROCEEDINGS

Petitioners were plaintiffs in a civil action brought in Baltimore City, Maryland (the "State Case") on behalf of themselves and Crescent City Estates, LLC ("CCE,") in which they owned a 50% ownership interest. The defendants were Giannasca Crescent City, LLC, Edward V. Giannasca, II ("Giannasca,") Stuart C. Fisher ("Fisher,") Tamara Jeanne Fisher, TJ Biscayne Holdings, LLC and Market Street Palm Beach, LLC, (collectively "Defendants") Crescent City was also a nominal defendant. Respondent Murphy was counsel for Fisher and Giannasca in the State Case.

Respondent Draper filed a voluntary Chapter 11 case (the "Bankruptcy") on behalf of CCE in the United States Bankruptcy Court for the Eastern District of Louisiana (the "Louisiana Bankruptcy Court"). Respondents Draper and Murphy then removed the State Case to the United States Bankruptcy Court for the District of Maryland (the "Bankruptcy Court"). All Defendants joined in the removal.

The Bankruptcy Court remanded the State Case, and held 28 U.S.C. § 1447 (the "Statute") permitted Petitioners to seek reimbursement for costs and attorney fees against Defendants *and* Respondents. Respondents were granted an interlocutory appeal to the United States District Court for the District of Maryland (the "District Court") from the Bankruptcy Court's adverse ruling. The District Court reversed, and as Appellants, Petitioners appealed to the

Fourth Circuit Court of Appeals, whose opinion is the subject of this Petition.

No parent corporations or publicly held corporations own 10% or more of the membership interests of any of Petitioners.

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The opinion of the United States Court of Appeals for the Fourth Circuit, *In re Crescent City Estates, LLC*, is published at 588 F.3d 822 (2009) and is reproduced in the Appendix to this Petition. Pet. App. A1.

The opinion of the United States District Court for the District of Maryland, *In re Crescent City Estates, LLC,* reversing the judgment of the Bankruptcy Court, is published at 2008 WL 5216243 (D. Md. Dec. 9, 2008) and is reproduced in the Appendix to this Petition. Pet. App. A20.

The opinion of the United States District Court for the Middle District of Tennessee, *Cedarstone Bank v. Music City RV, et al.,* granting Plaintiff's Motion to Remand and Motion for Attorney's Fees and dated August 28, 2008. Pet. App A34

The Memorandum of Decision of the United States Bankruptcy Court for the District of Maryland remanding the Maryland Case, except for Petitioners' request for costs and attorneys fees, is published at 2008 WL 704379, and is reproduced in the Appendix to this Petition. Pet. App. A37.

JURISDICTION

The judgment of the Court of Appeals was entered on December 7, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES

28 U.S.C. § 1447. *Procedure after removal generally*

> (c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. § 1912:

> Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

Appellate Rule 38:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to

respond, award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

On February 23, 2007, Petitioners filed an action (the "State Case") in the Circuit Court for Baltimore City, Maryland (the "Baltimore Court") for themselves and derivatively on behalf of Crescent City Estates, LLC ("CCE"), asserting a substantial and pervasive conspiracy and fraud by the defendants, particularly Edward V. Giannasca, II ("Giannasca") and Stewart C. ("Neil") Fisher ("Fisher,") arising from the theft by the defendants of approximately $15 million in insurance proceeds and other funds from CCE and McCrary. CCE was also named as a nominal Defendant. During all relevant times, Giannasca and Fisher were represented in the State Case by Respondent Murphy. Respondent Murphy never represented CCE in the State Case.

On August 23, 2007, two business days before scheduled dispositive hearings on default judgments against Fisher, Giannasca and other defendants in the Baltimore Court, at the behest of Fisher and Giannasca, Respondent Draper filed a voluntary Chapter 11 bankruptcy proceeding on behalf of CCE (the "Bankruptcy Case") in the United States Bankruptcy Court for the Eastern District of Louisiana(the "Louisiana Bankruptcy Court"). The very next day, Respondents removed the State Case to the United States Bankruptcy Court for the District of Maryland (the "Bankruptcy Court") and simultaneously filed a motion to transfer the venue of the State Case (the "Transfer Motion") to the

Louisiana Bankruptcy Court. The State Case default hearings were therefore cancelled. At that time Fisher was in contempt for failure to obey numerous orders of the Baltimore Court, and Giannasca had failed to answer the Complaint or provide discovery. The default judgments were highly likely to have been granted, and were in fact ultimately granted ten months later after the State Case was remanded to the Baltimore Court.

On September 7, 2007, McCrary filed an opposition to the Transfer Motion in the Bankruptcy Court, and sought remand of the State Case to the Baltimore Court together with reimbursement for attorneys' fees and expenses against the defendants in the State Case pursuant to 28 U.S.C. § 1447(c) (the "Remand Motion"). Petitioners also moved to dismiss the Bankruptcy Case in the Louisiana Bankruptcy Court (the "Motion to Dismiss").

On March 14, 2008, the Bankruptcy Court granted the Remand Motion and denied the Transfer Motion, expressly reserving jurisdiction to decided on the request for attorneys' fees and expenses pursuant to 28 U.S.C. § 1447(c). On March 25, 2008, after an evidentiary hearing, the Louisiana Bankruptcy Court granted the Motion to Dismiss the Bankruptcy Case, holding that the Bankruptcy Case filing was unauthorized and expressly finding (a) Fisher had no membership interest in CCE, (b) Petitioners never transferred their ownership interest in CCE, and (c) Giannasca was not authorized to file the Bankruptcy Case.

On that same date, Petitioners amended the Remand Motion to include a request for fee reimbursement against Respondents under 28

U.S.C. § 1447(c) for their participation in the wrongful removal of the State Case to the Bankruptcy Court.

Following the dismissal of the Bankruptcy Case and the remand of the State Case, judgments in excess of $33 million were entered on June 27, 2008 (as revised on July 11 and September 16), in favor of Petitioners, collectively and derivatively on behalf of CCE, jointly and severally against Fisher, Giannasca and all other defendants. In rendering those judgments at the conclusion of the trial, Hon. Paul Alpert, a former judge in the Baltimore County Circuit Court and Court of Special Appeals of Maryland, specially assigned to the State Case, observed on the record that in his 51 years of law practice and sitting on the bench, the conduct of the Defendants in the State Case was the most "egregious and blatant display of fraud, misconduct and abuse and misuse of the legal system" he had ever seen.[1]

Unquestionably the defendants in the State Case improperly used the Bankruptcy case and the removal to disrupt the State Case. In late 2007 and 2008, in discovery in the Bankruptcy case and the State Case after remand, Petitioners discovered material facts suggesting complicity of Respondents in improprieties related to the Bankruptcy Case, the

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[1] The defendants appealed to the Court of Special Appeals, who affirmed jurisdiction over all defendants and their liability. The damage award was vacated, however, and the case was remanded for a new damages hearing. The defendants petitioned the Court of Appeals of Maryland for a writ of Certiorari, which was denied, and then filed a Request for Reconsideration of the denial, which is still pending.

removal and other efforts to interfere with the State Case.[2]

These allegations were outlined in Petitioner's Amended Remand motion seeking fee reimbursement against Respondents. It also became clear the defendants in the State Case had concealed or dissipated the misappropriated funds, and recovery from them of Petitioners' costs and attorney fees from the removal was unlikely.

Respondents opposed fee reimbursement against them raising several procedural, jurisdictional and statutory issues the Bankruptcy Court agreed to address as preliminary matters. One of those issues was whether in a "wrongful removal" of a state court case to federal court, a federal court has the authority to impose liability for fee or expense reimbursement upon an attorney under 28 U.S.C. § 1447(c), regardless of the circumstances.

On September 17, 2008, following a hearing the Bankruptcy Court issued its Order Resolving "Preliminary Issues" and Requiring Fed. R. Civ. P. Rule 26(f) Report (the "Bankruptcy Court Order") in which all of the preliminary issues were resolved against Respondents.

Respondents sought and were granted an interlocutory appeal by the United States District Court for the District of Maryland (the "District Court"). The District Court reversed the Bankruptcy Court and entered a final judgment in favor of

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[2] Prior to filing the Bankruptcy case, the defendants in the State Case, with the knowledge and assistance of Respondents, instituted other litigation in an attempt to derail the State Case, including an attempted dissolution of CCE in Louisiana.

Respondents, dismissing all of Petitioner's claims against them. Pet. App. __A. Petitioners appealed to the United States Court of Appeals for the Fourth Circuit (the "Court of Appeals,") which affirmed the District Court.

In a nutshell, both the District Court and the Court of Appeals held that even if the Statute authorized fee shifting, if attorneys are not expressly mentioned, application of the "American rule" precludes liability under the Statute for costs or fees.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

The legal system in this country enables injured parties to seek compensation from the persons responsible for injuries resulting from tort, breach of contract, statutory violation or other wrongful or injurious behavior. The judicial process is integral to the pursuit of those remedies,. but substantial harm can also result from improper or unlawful actions taken in the course of the litigation itself, totally independent of the original conduct. This petition concerns a party's remedy for the latter type of injury.

The damage caused by wrongs inflicted on an innocent party during the judicial process is no less real than from the conduct spawning the underlying litigation. There is one major difference, however: because lawyers are direct participants in the litigation, these injuries may result from the wrongful or unlawful conduct of a party, its counsel, or both.

It is uncontroverted that 28 U.S.C. § 1447(c) (the "Statute") provides for an award of costs and expenses, including attorney fees, as a remedy for wrongful removal. This Petition arises from the holding of the Circuit Court that even if Respondents were deliberately, knowingly, unlawfully, and solely responsible for the wrongful removal of the State Case, no award of costs and expenses is available against them under the Statute. Petitioners contend the plain language, legislative history, and policy of the Statute, together with clear and compelling decisions of this Court and others, require the opposite conclusion.

The decision of the Court of Appeals is in conflict with decisions of two other United States courts of appeals, and departs from what appears to be the accepted and usual course of judicial proceedings. At least eight United States district courts and the Bankruptcy Court reached contrary results, and the only district court to reach the same conclusion as the Court of Appeals did so because it found the authority to award sanctions against an attorney under Statute to be "unclear." Because costs and fees are often imposed in unpublished orders, it is difficult if not impossible to catalog all of the cases, but the language of the reported cases unequivocally suggests that in appropriate situations, the courts have no doubt of their authority to impose this obligation on counsel.

The Court of Appeals' decision also ignores the consistent holdings of the Circuit Court and other courts of appeals that both 28 U.S.C. § 1912 and Appellate Rule 38 permit imposition of costs and fees on counsel in appropriate cases. Both provisions

contain language analogous to the Statute, and like the Statute (i) address abusive behavior in the judicial process, (ii) provide for fee and expense reimbursement, and most significantly, (iii) contain no express reference to attorneys.

It is clear that holding of the Circuit Court conflicts with the overwhelming weight of judicial practice and proceedings. If left to stand, it will not only foster great confusion and uncertainty, but will open the door to the very abuses of the removal process Congress sought to curb.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW MISINTERPRETS FEDERAL LAW AND CONTRADICTS CONGRESSIONAL INTENT GIVING A FEDERAL COURT DISCRETION TO APPLY THE STATUTE TO COUNSEL.

The Statute was part of the Judicial Improvements and Access to Justice Act of 1988 (the "Act"), representing the continuation of a long-term effort to relieve chronically overloaded federal courts. Pub. L. No. 100-702 Stat. 4626 (1988). While the Act eliminated the bond posting previously required by 28 U.S.C. § 1446(d) as a "cost that may be substantial to some litigants and constitutes an additional procedural requirement" H.R. No. 100-899 100th Cong. (2d Sess. 1988) at 72. Congress furthered the objectives of the Act by ensuring that federal courts "may order payment of actual expenses caused by an improper removal." *Id.*

The Statute's authorization to impose expense reimbursement was not, as the Circuit Court incorrectly surmises, authority to impose the types of

costs that had been secured by the bond. Rather, the Statute transformed § 1446 into a fee-shifting statute, *Morris v. Bridgestone/Firestone, Inc.*, 985 F.2d 238, 240 (6th Cir. 1993); *Garbie v. Daimler Chrysler Corp.*, 211 F.3d 407, 411 (7th Cir. 2000). The Statute amended § 1446 to "significantly expand" the discretion of federal courts to allow expense reimbursement, including legal fees when before an award was limited to "costs". *Morris*, 985 F.2d at 240. The Statute thereupon embodied fee-shifting to entitle the victim of wrongful removal to be made whole for the incremental costs of being "wrongfully drags them into a second judicial system." *Garbie*, 211 F.3d at 411. As the Seventh Circuit stated "unjustified removal complicates and extends litigation." *Id.*

The imposition of expense reimbursement under the Statute was intended to deter wrongful and abusive removals and compensate their victims. That predominate statutory purpose, to significantly expand reimbursement, would be significantly undermined, in the face of the elimination of the bond as a certain source of repayment (albeit a procedural complication), if such compensation was limited in all circumstances to the creditworthiness of the removing parties. This would turn the Congressional intent on its head. Congress would have expanded the right to compensation but made the source of that compensation more risky and uncertain.

To the contrary, the Statute, consistent with its express language and the achievement of its legislative purpose, should be construed to permit federal courts to impose expense reimbursement for

wrongful removal on any responsible person, whether a party and/or counsel. The impecunious party should not be a shield for improper counsel conduct through abuse of the removal process thereby promoting the very misconduct Congress sought to prevent.

In *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005), this Court determined judicial discretion to be the standard for fee shifting under the Statute:

> The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources. Assessing costs and fees on remand reduces the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff. The appropriate test for awarding fees under [the Statute] should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied.

Id. at 140.

In *Martin,* this Court articulated the clear standard that an award of costs or fees is only justified when there is no objectively reasonable basis for

removal. The imposition of expenses upon an attorney under those circumstances is entirely consistent with this Congressional purpose. To suggest otherwise, either (i) frustrates the Congressional purpose by providing no remedy where the removing party is innocent or (ii) imposes the burden of such expenses on an innocent party, conflicting with the Congressional purpose of avoiding deterrence of proper removals. Id.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT COURTS AND THE OVERWHELMING WEIGHT OF AUTHORITY AND JUDICIAL PRACTICE

Even prior to *Martin*, the Eastern District of Wisconsin and the Southern District of New York concluded the Statute specifically shifts fees, without limitation, to those responsible for a wrongful removal, including an award against counsel.

In *Wisconsin v. Missionaries to the PreBorn*, 798 F. Supp. 542, 544 (E.D. Wis. 1992), the Eastern District of Wisconsin held that Section 1447(c)

> ...does not contain any express or even any implied limitation on the court's authority to impose joint and several liability on attorneys and their clients when awarding costs and expenses pursuant to § 1447(c). A contrary interpretation of § 1447(c) would be arguably inconsistent with

> both Rule 11, Federal Rules of Civil Procedure, and ethical rules of conduct for attorneys.

That court concluded it had discretion under the Statute to order an award against attorneys for filing "baseless papers or pleadings" and held attorneys of record should share responsibility for the plaintiffs' attorney's fees. *Id.*

The Southern District of New York expressed a similar analysis in *Polanco vs. 21 Arden Realty Corp.*, 121 B.R. 425 (S.D.N.Y. 1990). *Polanco* dealt with allegations similar to those against Respondents, namely that the "removal and/or response to [the remand motion] toyed with the justice system with the manifest hope of delaying all proceedings."

The *Polanco* court held at p.428 that Section 1447(c) permitted an award against the attorneys themselves, and also imposed additional sanctions under Rule 11, requiring the lawyers to pay $5,000 to the U.S. Treasury—*precisely* the type of "more severe sanction" expressly contemplated in the legislative history of the Statute:

> [T]he proposed amendment to Section 1447(c) will ensure that a substantive basis exist for requiring payment of actual expenses incurred in resisting an improper removal; civil rule 11 can be used to impose a more *severe* sanction when appropriate.

H.R. No. 100-899 at 72.

Following Martin, Courts of Appeals for the Sixth and Ninth Circuits, as well as United States District Courts for (i) Arizona[3], (ii) New Mexico[4], (iii) the Middle District of Florida[5], (iv) the Western District of Louisiana[6], (v) the Southern District of Iowa[7], (vi)

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[3] In *Wells Fargo Bank, NA v. Corte Freccia I, LLC*, CV-08-1911-PHX-MHM, 2009 WL 3188424 (D. Ariz. Sept. 29, 2009), the court reacted to exactly the type of conduct Petitioners allege occurred in this case, and said: "In any event, it is obvious that filing for removal was part of a *larger strategy to forestall state court proceedings*. There is no other way to reasonably explain the actions taken by Corte Freccia and Mr. Armstrong. As such, an award of attorney's fees under 28 U.S.C. § 1447(c) is appropriate against Corte Freccia and Mr. Armstrong." (Emphasis added.)

[4] *See Doe ex rel. Hughes v. Martinez*, CIV-09-104 WJ/WPL, 2009 WL 4895543 (D.N.M. Apr. 3, 2009).

[5] *See Peraza v. Mazak*, No. 8:07-CV2320-T-23 MAP, 2008 U.S. Dist. LEXIS 4098, at 8-9 (M.D. Fla. Jan. 18, 2008) (counsel, not client, accountable for lack of objectively reasonable basis for removal and ordered to reimburse "reasonable attorney's fees and costs incurred in defeating the spurious removal." The district court found the removal demonstrated "either a troubling ignorance of basic federal civil procedure or an unfortunate and misbegotten tactic, deployed to avoid an adverse ruling by the state court" which merited fee shifting against counsel.)

[6] *See, e.g. Hollier v. Willstaff Worldwide, Inc.*, CIV.A. 08-1382, 2009 WL 256503 (W.D. La. Feb. 3, 2009); *Saxon v. Thomas*, No. 06-2339, 2007 U.S. Dist. LEXIS 27635, (W.D. La. Apr. 12, 2007), *aff'd* Saxon v. Thomas, No. 06-2339, 2007 U.S. Dist. LEXIS 47562 (W.D. La. June 29, 2007)

[7] In *Brady v. Hallmark Dev. Co., L.C.*, 4:04-CV-40079, 2004 WL 841302 (S.D. Iowa Apr. 12, 2004), the court said although the conduct in question might well have justified Rule 11 sanctions on the court's initiative, the Statute could accomplish the same thing.

the Southern District of Ohio[8], and (vii) the Southern District of New York[9], all concluded the Statute authorizes a federal court to award expenses against counsel.

In *Taylor v. Currie*, 208 Fed. App'x. 401 (6th Cir. 2006), the attorney appealed "...the district court's order awarding attorneys' fees and costs and imposing sanctions pursuant to 28 U.S.C. § 1447(c), Rule 11 of the Federal Rules of Civil Procedure, and 28 U.S.C. § 1927...." The court affirmed, saying "we are convinced that the district court did not err in awarding attorneys' fees and costs to the attorneys for the Plaintiff-Appellee and imposing sanctions against [Appellant]."

Similarly, *Cedarstone Bank v. Music City RV, LLC*, 09-5239, 2009 WL 4307582 (6th Cir. Dec. 1, 2009),

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> However, in the matter now before the Court it would seem unnecessary to reach the kind of conclusions necessary to support an order of sanctions, or to promote the potential collateral consequences of such an order. The wrong that requires a remedy is the undue expense required of the Plaintiff, and that may be addressed by less strident means. "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c).

[8] *See Game Time Laser Tag Adventure, LLC v. MillsServices Corp.*, 2:05-CV-1094, 2006 WL 2422593 (S.D. Ohio Aug. 22, 2006): "An award under 28 U.S.C § 1447 may be made against a party, the party's counsel of record, or both. The liability imposed upon attorney and client may be joint and several." (*citation omitted* to *Missionaries to the PreBorn*).

[9] *See dela Rosa ex rel. dela Rosa v. 610-620 W. 141 LLC*, 08 CIV. 8080 (PKL), 2009 WL 1809467 (S.D.N.Y. June 24, 2009).

was an appeal from a district court's award of attorneys fees and costs against defendant's counsel. Acting with the awareness that without potential exposure themselves, attorneys wishing to manipulate the system could knowingly file wrongful removals for impecunious or judgment-proof clients, the district judge said "in light of Music City's bankruptcy, these fees are awarded against defense counsel." Pet. App. __A, at __.

Although the circuit court determined it did not have jurisdiction because the exact amount of the award had not yet been fixed, by sending the case back to the district court for a determination of the amount, the circuit court clearly had no intention of deviating from *Taylor*, *supra*.

Similarly, although it ultimately used its inherent power to impose sanctions on the attorney, in *In re DeVille*, 361 F.3d 539, 546 (9th Cir. 2004), the circuit court clearly confirmed the applicability of the Statute:

> On the present record this provision, *while applicable*, may be of limited utility.... In order for § 1447(c) to be utilized here, the bankruptcy court would need to make further findings that apply the statutory standard of "incurred as a result of the removal" and tie each dollar of the compensatory award to a removal, applying a removal-by-removal analysis. Such an exercise is simply unnecessary in light of the court's inherent power to assess

> compensatory sanctions. (Emphasis added).

In other words, there was an easier way.

Except for the holdings of the District Court and Circuit Court in this case, only two district court cases from the Western District of New York support the Circuit Court's conclusion. *See, Creek Ventures, LLC v. World Parts, LLC*, 2004 WL 1166642 (W.D.N.Y. 2004) and *Marketplace Illustrated, Inc. v. Intrex Travel, Inc.*, 1993 WL 405494 (W.D.N.Y. 2003). Both of these cases were decided prior to this Court's unanimous decision in *Martin,* and neither contains any meaningful analysis. In fact, the stated reason for *Creek Ventures'* holding was "[t]here is no authority in the Western District or in the Second Circuit for an award of fees against an attorney under § 1447. Because the authority to award sanctions against the attorney under this statute is unclear, the motion under § 1447 is denied." *Id* That is hardly a sufficient rationale on which to overcome two circuit courts and numerous district courts

III. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONTRADICTS THE PLAIN LANGUAGE THE STATUTE AND OTHER SIMILAR STATUTES AND RULES

The plain language of the Statute specifically shifts fees, without limitation, to those responsible for a wrongful removal. Adopting the determination of *Missionaries to the PreBorn* and *Polanco*, the Bankruptcy Court, reasoned:

...§1447(c) does not expressly limit the recovery of attorneys' fees to the removing party. Rather, the language provides that a court may award attorneys' fees, quote "incurred as a result of the removal," end quote.

It's my conclusion that the provision intends to dissuade frivolous or dilatory removals and to compensate a non-removing party who must pursue remand at some substantial cost. Such award being in the Court's discretion, the Court may find it factually appropriate, that the recovery of attorneys' fees may be imposed against a party who caused the non-removing party to incur the attorneys' fees and seek a remand. .

I find that the statutory language is sufficient and not limiting. It does not state, as I've already pointed out, that it is only available against the party in the underlying action that acted to remove. And it also does not state even that it has to be only the party, and not some other actor...if the facts are sufficient that it was counsel who was the actor that created a removal found to be wrongful, unjustified and sanctionable, I find there is no statutory shield by restricting the language of 1447(c).

Petitioner's Appendix

The Circuit Court's opinion is grounded on premises. First, contrary to the Bankruptcy Court's interpretation, the Circuit Court said

> [t]he proper presumption is that when a fee-shifting statute does not explicitly permit a fee award against counsel, it prohibits it. In short, silence does not equal consent. Because we find that the presumption is not overcome in this case, we accordingly hold that § 1447(c) does not apply to counsel."

The Circuit then went on to say

> The presumption that fee-shifting statutes apply only to parties unless they expressly state otherwise is consistent with the American Rule. Under the American Rule, "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."

Pet. App. __A, at __.

Respondents respectfully submit the Circuit Court missed one critical point, explicitly discussed at length by this Court in *Martin:* namely, the difference between fee shifting connected to liability on the underlying merits of a case, and fee shifting for wrongful acts in related to the *conduct of the judicial process* itself.

In *Martin* this Court went to great lengths to clarify that distinction. "Our cases have emphasized

the crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes." 546 U.S. at 137.

Thus where a lawyer defends a client in a civil rights case, for example, the lawyer should be insulated from liability for his client's prior misconduct with which the lawyer presumably had nothing to do. But a lawyer who is a culpable participant in actual misuse of the legal system should have responsibility for those actions like anyone else.

In other words, on the question of counsel's liability, "it's not whether you win or lose; it's how you play the particular game." A lawyer who represents a client on the merits—a game that has already been played-- generally has no liability for the consequences of the client's acts. However, when the lawyer violates the rules for or jointly with the client, there should be no immunity for the lawyer's own misconduct. *See Thomas v. Digital Equip. Corp.*, 880 F.2d at 1491 (assessing attorneys' fees and double costs against counsel under 28 U.S.C. § 1912 and Appellate Rule 38 because "they wrote the brief.").

No express exclusion of counsel is found in the Statute, in the texts of 28 U.S.C. § 1912, or Appellate Rule 38, and like 28 U.S.C. § 1912 and Appellate Rule 38, no exclusion of counsel should be implied in the Statute. Just as *Missionaries to the PreBorn* and its progeny applied the Statute, courts of appeals have not hesitated to apply 28 U.S.C. § 1912 and Appellate Rule 38 to counsel and litigants based on their degree of responsibility for the misconduct in the particular circumstance.

Both the Circuit Court and District relied heavily on the argument that the availability of other remedies, such as Rule 11 and 28 U.S.C. § 1912 to impose sanctions on an attorney somehow proves that Congress did not intend to included lawyers in the Statute.

It is clear, however, each remedy serves a particular purpose, they are by no-means mutually exclusive, and as shown *supra* courts have used one or more them coextensively with the Statute where appropriate.

For example, in Gibson v. Chrysler Corp., 261 F.3d 927, 950 (9th Cir. 2001), *holding on unrelated issue modified by Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005), the court said:

> Because the standards for Rule 11 sanctions and § 1447(c) fee awards differ, our affirmance of attorneys' fees is not inconsistent with our reversal of sanctions. The standard for awarding attorneys' fees under § 1447(c) is "something less than that required for an award of attorney's fees under Rule 11." 16 Moore's § 107.41(3)(b) at 107-218.6; see Moore v. Permanente Med. Group, 981 F.2d at 446-47 (§ 1447(c) does not mirror Rule 11 because it is not punitive and does not require bad faith).

See, also. Brady, Doe ex rel. Hughes, Polanco, In re DeVille, and *Cedarstone Bank*.

As illustrated above, some of these remedies may not be available or appropriate for various reasons. In this case Petitioners did not fully learn of the extent of Respondent's conduct until months after the removal was filed—well beyond the expiration of the Rule 11 notice period. Should that insulate the lawyer from responsibility for his acts?

IV. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW IS INCONSISTENT WITH PUBLIC POLICY

Inherent in our judicial system is the freedom of lawyers to act on behalf of their clients, within established legal and ethical constraints, without fear of personal liability. On the other hand, lawyers are officers of the court and are entrusted with a unique responsibility as primary protectors of the rule of law.

Fortunately, it is the exception when counsel does not properly balance those two obligations, and courts understandably approach fee-shifting and/or imposition of damages against lawyers with great care. In this case, however, the result reached by the Circuit Court simply cannot be justified by the language or policy of the Statute, its legislative intent, the overwhelming weight of applicable authority, or common sense.

In the majority of instances, fee shifting is associated with statutory remedies for injuries caused by conduct prior to unrelated to the litigation in which the award of costs is considered. In contrast, in the Statute and other statutes and rules protecting the judicial process itself, the conduct for which fee shifting is contemplated occurs in that

very proceeding, and the discretion to impose an award of costs and fees against the person(s) responsible for the injury, including counsel where appropriate, is essential for courts to curb abuses, deter misconduct, and preserve the integrity of the legal process.

Petitioners do not remotely suggest lawyers have blanket joint and several liability with parties for every wrongful removal. Petitioners do contend, notwithstanding the absence of any express reference to counsel, the Statute was intended to give federal courts the discretion to hold a lawyer accountable for his or her own conduct in connection with a wrongful or abusive removal just as 28 U.S.C. § 1912 and Appellate Rule 38 authorize recovery of costs against counsel for appellate abuses,.

Where counsel is the responsible party, there is no statutory or public policy basis to insulate them from liability or to conclude Congress had any such intention. To do so would encourage removals for wrongful or improper purposes by unscrupulous lawyers, especially where the client is "judgment proof," and would completely deprive aggrieved parties like Petitioners of any effective remedy.

Courts have the wisdom to properly exercise their discretion and avoid the doomsday scenario envisioned by the Circuit Court. There is no evidence application of the Statute in the multiple jurisdictions cited above has "...[begun] to transform what it means to practice law" as the Circuit Court fears.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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March , 2009

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588 F.3d 822
United States Court of Appeals,
Fourth Circuit.

In re CRESCENT CITY ESTATES, LLC, Debtor.

MR Crescent City, LLC; McCrary Crescent City, LLC; Michael C. McCrary, Plaintiffs-Appellants,
v.

Douglas S. Draper; William J. Murphy, Parties-in-Interest-Appellees,
and

Giannasca Crescent City, LLC; Edward V. Giannasca, II; Crescent City Estates, LLC; Stuart C. Neil Fisher; TJ Biscayne Holdings, LLC; Market Street Properties Palm Beach, LLC; Tamara J. Fisher, Defendants.

No. 08-2367.Argued Oct. 29, 2009.Decided Dec. 7, 2009.

Attorneys and Law Firms

*824 **ARGUED:** Mark Jerome Friedman, DLA Piper U.S. LLP, Baltimore, Maryland, for Appellants. W. Neil Eggleston, Debevoise & Plimpton, LLP, Washington, DC, for Appellees. **ON BRIEF:** David B. Misler, DLA Piper U.S. LLP, Baltimore, Maryland; William H. Murphy, Jr., Kenneth B. Frank, William H. Murphy, Jr. & Associates, PA, Baltimore, Maryland, for Appellants. Alan M. Grochal, Kristin P. Herber, Tydings & Rosenberg, LLP, Baltimore, Maryland, for Appellee Douglas S. Draper.

Before WILKINSON, MICHAEL, and AGEE, Circuit Judges.

Opinion

Affirmed by published opinion. Judge WILKINSON wrote the opinion, in which Judge MICHAEL and Judge AGEE joined.

OPINION

WILKINSON, Circuit Judge:

This case presents a purely legal question: whether 28 U.S.C. § 1447(c) permits the imposition of legal fees on an attorney who erroneously removes a case from state to federal court. The district court held that it does not. We affirm.

I.

This case began in Maryland state court in February 2007. Several entities with an ownership stake in Crescent City Estates, LLC (collectively, appellants) brought a derivative suit against defendants Crescent City Estates, LLC and its managers, alleging that the managers had not accounted properly for approximately $12 to 15 million in insurance proceeds. In connection with the litigation, defendants retained as legal counsel the appellees in this case: attorneys Douglas S. Draper and William J. Murphy.

About six months after the suit's commencement, defendants removed the state court action to the United States Bankruptcy Court for the District Court of Maryland. As lawyers for the defendants, appellees signed the notice of removal. Shortly thereafter, appellants filed a motion to remand the case back to state court. In doing so, appellants sought attorneys' fees for improper removal under 28 U.S.C. § 1447(c), which allows a court to "require payment of ... attorney fees ... incurred as a result of removal." Notably, appellants sought attorneys' fees both from defendants and from their attorneys, the appellees.

The attorneys argued that they could not be liable, claiming that § 1447(c) authorized the imposition of attorneys' fees only against removing parties and not

against removing attorneys. The federal bankruptcy court, however, disagreed. It held that, as a matter of law, § 1447(c) applied both to parties and to attorneys. Appellees sought immediate review, and on interlocutory appeal, the United States District Court for the District of Maryland reversed. *Crescent City Estates, LLC v. MR Crescent City, LLC* (*In re Crescent City*), 2008 WL 5216243 (D.Md. Dec. 9, 2008). After examining statutory text, legislative history, and relevant case law, the *825 district court concluded that "§ 1447(c) ... [gave] authority to impose liability for costs (including legal fees) upon parties but not attorneys." *Id.* at *4. Appellants now ask us to reverse the district court's decision.

II.

The statute, 28 U.S.C. § 1447(c), states in relevant part: "An order remanding [an erroneously removed] case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal." The statute, however, does not state expressly *who* may be required to make such payment. Appellants contend that both removing parties and their lawyers are liable, while appellees assert that only removing parties are liable.

As of yet, no circuit court has confronted this issue, and the district courts that have addressed it are badly divided. *Compare Creek Ventures, LLC v. World Parts, LLC*, 2004 WL 1166642, at *4 (W.D.N.Y. Apr. 14, 2004) (holding that § 1447(c) does

not apply to counsel); *Marketplace Illustrated Inc. v. Intrex Travel, Inc.*, 1993 WL 405494, at *3 (W.D.N.Y. Sept. 30, 1993) (same), *with Peraza v. Mazak*, 2008 WL 186613, at *3 (M.D.Fla. Jan. 18, 2008) (holding that § 1447(c) applies to counsel); *Saxon v. Thomas*, 2007 WL 1115239, at *5-6 (W.D.La. Apr. 12, 2007) (same), *aff'd by*2007 WL 1974914 (W.D.La. June 29, 2007); *Game Time Laser Tag Adventure, LLC v. MillsServices Corp.*, 2006 WL 2422593, at *1 (S.D.Ohio Aug. 22, 2006) (same); *Wisconsin v. Missionaries to the Preborn*, 798 F.Supp. 542, 543-44 (E.D.Wis.1992) (same); *Polanco v. 21 Arden Realty Corp.*, 121 B.R. 425, 428 (S.D.N.Y.1990) (same).

1 Appellants argue that because § 1447(c) does not explicitly prohibit a fee award against counsel, it thereby permits it. Appellants, however, have the presumption reversed. The proper presumption is that when a fee-shifting statute does not explicitly permit a fee award against counsel, it prohibits it. In short, silence does not equal consent. Because we find that the presumption is not overcome in this case, we accordingly hold that § 1447(c) does not apply to counsel.

III.

234 The presumption that fee-shifting statutes apply only to parties unless they expressly state otherwise is consistent with the American Rule. Under the American Rule, "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee

from the loser." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). In other words, the American Rule creates a presumption that parties bear their own legal costs, win or lose. *Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 533, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994). The American Rule's presumption can be further subdivided into two distinct underlying premises: first, that parties bear *their own* legal fees and second, that parties bear legal fees.

567 Congress is, of course, free to alter either or both of these premises through legislation. *See id.* However, departures from the American Rule require "explicit statutory authority." *See Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Servs.,* 532 U.S. 598, 602, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). In other words, if Congress wishes to overcome either premise underlying the American Rule, it must express its intent to do so clearly and directly. This is because the American Rule is a longstanding legal principle, *see* *826 *Key Tronic Corp. v. United States,* 511 U.S. 809, 815, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994), and one "deeply rooted" in our nation's common law tradition, with origins dating back perhaps as early as 1796. *Alyeska Pipeline,* 421 U.S. at 271, 249-50, 95 S.Ct. 1612 (citing *Arcambel v. Wiseman,* 3 U.S. (3 Dall.) 306, 1 L.Ed. 613 (1796)). And "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas,* 507 U.S. 529, 534, 113 S.Ct. 1631, 123

L.Ed.2d 245 (1993).

89 Absent explicit authorization from Congress, it is our duty to keep the American Rule intact. "Congress ha[s] not 'extended any roving authority to the Judiciary to allow counsel fees ... whenever the courts might deem them warranted.' " *Buckhannon*, 532 U.S. at 610, 121 S.Ct. 1835 (citing *Alyeska Pipeline*, 421 U.S. at 260, 95 S.Ct. 1612). Because fee-shifting statutes are "in derogation of the common law," courts are obligated to construe them strictly, *Rowe v. U.S. Fid. & Guar. Co.*, 375 F.2d 215, 219 (4th Cir.1967), employing a "presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident," *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 96 L.Ed. 1294 (1952). This means that unless there is at least some indication that Congress intended *attorneys* to pay under § 1447(c), we will apply the American Rule's presumption that *parties* pay.

10 In this case, it is undisputed that Congress intended § 1447(c) to modify the American Rule in part. Section 1447(c) is, after all, a fee-shifting statute. *See Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137-38, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005). Thus, the parties agree that § 1447(c) was meant to overcome the first premise underlying the American Rule (that parties bear *their own* legal fees), thereby enabling courts to shift fees from the prevailing party (here, the party successfully

obtaining remand) to the losing party (here, the party erroneously attempting removal). Appellees argue that § 1447(c) stops there, leaving undisturbed the second premise of the American Rule (that *parties* bear legal fees). That is, whether prevailing or losing, it is nonetheless parties-not attorneys-who bear attorneys' fees. Appellants, on the other hand, would have us depart from the American Rule more radically, by shifting fees not merely from a prevailing litigant to a losing litigant, but from a prevailing litigant to a losing attorney. Under this view, § 1447(c) reverses both parts of the American Rule's presumption, shifting fees and introducing a new payer.

We see no justification for the dramatic deviation from the American Rule advocated by appellants. Neither § 1447(c)'s text nor its legislative history is sufficient to overcome the American Rule's presumption that parties rather than attorneys are liable for attorneys' fees. *First,* the text of § 1447(c) makes no explicit mention of counsel. And because "Congress legislates against the strong background of the American Rule," *Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 533, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994), the fact that Congress did not explicitly exclude counsel from the reach of § 1447(c) is no indication of congressional intent to include counsel. Congress knows that in order to demonstrate an "inten[t] to set aside th[e] longstanding American [R]ule," "[m]ere generalized commands ... will not suffice to authorize ... fees." *Key Tronic,* 511 U.S. at 815, 114 S.Ct. 1960 (citations and internal

quotations omitted). Indeed, Congress has shown that when it wants to make attorneys liable under fee-shifting statutes, it will do so expressly. For instance, in *827 28 U.S.C. § 1927, Congress unambiguously empowered courts to require "[a]ny attorney ... who so multiples the proceedings in any case unreasonably and vexatiously ... to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." The omission of comparable express authorization in § 1447(c) thus "strongly suggest[s] a deliberate decision not to authorize such awards." *See Key Tronic*, 511 U.S. at 818-19, 114 S.Ct. 1960.

Although the statutory text does not explicitly forbid fee awards against counsel, it does so implicitly. The statute speaks, by implication, only to parties. Section 1447(c) allows a court to impose a fee award in "[a]n order remanding the case," which, as the district court noted, "would normally, if not inevitably, be contemplated as one that pertains to parties and not counsel." *Crescent City*, 2008 WL 5216243, at *4. The most natural reading of § 1447(c) is that it applies solely to litigants, who have a genuine stake in whether or not the case is remanded-and not to attorneys, who may not even remain involved in the case post-remand.

In fact, the Supreme Court has repeatedly emphasized the "crucial connection" between liability on the merits and liability for attorneys' fees under fee-shifting statutes. *See Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 762, 109

S.Ct. 2732, 105 L.Ed.2d 639 (1989). For example, in *Kentucky v. Graham*, 473 U.S. 159, 164, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), the Court observed that although "[s]ection 1988 does not in so many words define the parties who must bear these costs [of attorneys' fees]," it was "[n]onetheless ... clear that the logical place to look for recovery of fees is to the losing party-the party legally responsible for relief on the merits." Simply put, "fee liability runs with merits liability." *Id.* at 168, 105 S.Ct. 3099;*see also id.* at 165, 105 S.Ct. 3099 ("[L]iability on the merits and responsibility for fees go hand in hand."). This court has likewise recognized that one's "status as a nonparty" generally provides protection from fee liability. *See Johnson v. City of Aiken*, 278 F.3d 333, 338 (4th Cir.2002). Thus, because attorneys are nonparties not liable on the merits, they are generally outside the ambit of fee-shifting statutes.

11*Second*, our conclusion is confirmed by the legislative history. While such history cannot be used to override statutory text, it can serve as a useful supplement. Like the statute's text, the legislative history here makes no express mention of attorney liability. It defies common sense to think that Congress wished to expand fee liability to encompass lawyers but failed to say anything at all about that wish, at any point, during the statute's consideration. "Such a bold departure from traditional practice would have surely drawn more explicit statutory language and legislative comment." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994).

To the contrary, the legislative history suggests that Congress anticipated that § 1447(c) would apply exclusively to litigants. Section 1447(c) was enacted in 1988 to succeed a former statutory provision, which subjected defendants to a "bond requirement." *See* H.R. 4807, 100th Cong. (1988); 28 U.S.C. § 1446(d) (repealed). Under this bond requirement, defendants had to post a bond, prior to removal, in order to secure payment for costs incurred if removal turned out to be improper. *Id.* Significantly, this bond requirement explicitly applied only to parties, limiting liability to "defendant or defendants." *Id.*

The legislative history states that § 1447(c) was designed merely to "replace *828 the bond provision," H.R.Rep. No. 100-889, at 72 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5982, 6033, thus directly substituting a *party's,* obligation to pay costs ex ante with a *party's* obligation to pay costs ex post. If Congress had intended § 1447(c) not only to change the timing of payments but also to expand the categories of individuals potentially liable for payments, that expansion probably would have generated at least minimal legislative debate. Instead, § 1447(c) was enacted as part of a "noncontroversial," omnibus bill. *See* 134 Cong. Rec. H7443-02 (Sept. 13, 1988) (statement of Rep. Moorhead). In conclusion, nothing demonstrates a congressional intent to overcome the American Rule in order to make attorneys liable for an adversary's attorneys' fees.

IV.

Moreover, federal case law corroborates our holding. Indeed, the Supreme Court and other circuits have interpreted fee-shifting statutes with text materially indistinguishable from that of § 1447(c) to be inapplicable to counsel. These cases firmly support the presumption that fee-shifting statutes shift fees only to parties unless they expressly state otherwise.

For example, in *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 758, n. 5, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980), the Supreme Court examined fee-shifting provisions in 42 U.S.C. §§ 1988 and 2000e-5(k), which allowed successful plaintiffs "a reasonable attorney's fee as part of the costs," without specifying who was responsible for that "reasonable attorney's fee." The Court declined to make lawyers responsible for fees under those sections, noting that "[n]either § 1988 nor § 2000e-5(k) makes any mention of attorney liability for costs and fees." *Id.* at 761., 100 S.Ct. 2455 This case fairly stands for the more general proposition that, presumptively, when a fee-shifting statute is silent about who pays attorneys' fees, parties-not attorneys-are accountable.

The presumption is widely held. As the Second Circuit summarized, "When a fee-shifting statute that authorizes the courts to award attorneys' fees ... does not mention an award against the losing party's attorney, the appropriate inference is that an award against attorneys is not authorized." *Healey v. Chelsea Res., Ltd.,* 947 F.2d 611, 624 (2d Cir.1991).

Other circuits have likewise held that fee-shifting statutes presumptively apply only to litigants. And these courts have so held in a wide array of contexts, interpreting fee-shifting provisions under civil rights statutes, under the Securities Act, under the False Claims Act, under the Federal Rules of Civil Procedure, and under the Copyright Act. *See Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1238 (11th Cir.2007) (42 U.S.C. § 2000e-5(k)); *Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1222 (10th Cir.2006) (42 U.S.C. § 1988); *Foster v. Mydas Assocs., Inc.*, 943 F.2d 139, 142 (1st Cir.1991) (42 U.S.C. § 1988); *Brown v. Borough of Chambersburg*, 903 F.2d 274, 276-77 (3d Cir.1990) (42 U.S.C. § 1988); *Healey v. Chelsea Res., Ltd.*, 947 F.2d 611, 624 (2d Cir.1991) (§ 11(e) of the Securities Act, 15 U.S.C. § 77k(e)); *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1005-06 (9th Cir.2002) (False Claims Act, 31 U.S.C. § 3730(d)(4)); *Heckethorn v. Sunan Corp.*, 992 F.2d 240, 242 (9th Cir.1993) (Rule 41(a)(2)); *Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1238 (11th Cir.2007) (Rule 26(g)); *Crescent Publ'g Group, Inc. v. Playboy Enters., Inc.*, 246 F.3d 142, 150 (2d Cir.2001) (Copyright Act, 17 U.S.C. § 505).

12 These decisions interpret fee-shifting statutes with language remarkably similar to the language of § 1447(c). Like § 1447(c), the provisions in these cases *829 vest courts with discretion to award attorneys' fees but do not expressly state who must pay those fees. Accordingly, we choose to interpret § 1447(c) similarly. As the Supreme Court has explained, "fee-shifting statutes' similar language is 'a strong indication' that they are to be interpreted

alike." *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758, n. 2, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989); *see also Ruckelshaus v. Sierra Club*, 463 U.S. 680, 691, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983) ("[S]imilar attorney's fees provisions should be interpreted *pari passu*."); *Northcross v. Bd. of Educ. of Memphis City Schools*, 412 U.S. 427, 428, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973) (per curiam) ("[S]imilarity of language ... is, of course, a strong indication that ... two statutes should be interpreted *pari passu* "). In doing so, we "avoid ... inconsistency in ... fee award decisions." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 537, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994) (Thomas, J., concurring) (citations omitted).*

V.

Finally, the consequences of departing from sound statutory construction would be severe. For one thing, subjecting counsel to § 1447(c) liability for improvident removals would only generate more collateral litigation. "A request for attorney's fees should not result in a second major litigation, and ... accordingly [courts should] avoid[ ] an interpretation of the fee-shifting statutes that would ... spawn[ ] a second litigation of significant dimension." *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Servs.*, 532 U.S. 598, 609, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) (citations and internal quotations omitted). In this case, because fee requests are made at the time of a remand order, applying § 1447(c) to counsel would

build an [*830] extra layer of litigiousness into the middle of a case. Since § 1447(c) provides no "formula for 'ready administrability,' " *id.* at 610, 121 S.Ct. 1835, a litigious period would be required to establish the proper standards for attorney, as opposed to party, liability. *See Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005) (holding that a party may be liable under § 1447(c) "only where the removing party lacked an objectively reasonable basis for seeking removal"). Courts would also be forced to decide, without legislative guidance, when an attorney should be held solely liable, when an attorney should be held jointly and severally liable with a client, or whether fees should be apportioned between lawyer and client (or lawyers and clients, as the case may be) based on some yet unknown formula.

Plus, § 1447(c)'s application to lawyers could promote the provision's use as a disruptive litigation tactic, employed to pit lawyer and client against each other, thereby causing further friction and delay. Forcing an attorney to defend his actions in the midst of litigation might create a conflict of interest or rift in the lawyer-client relationship, possibly forcing the lawyer to withdraw, *see Healey v. Chelsea Res., Ltd.*, 947 F.2d 611, 623 (2d Cir.1991), or require the attorney to reveal privileged and confidential information relating to the case. 13 Additionally, exposing lawyers to personal monetary liability whenever they remove a case risks chilling the right of removal. Removal is a

federal right, which Congress has long provided and which courts have long protected. *See Martin,* 546 U.S. at 137, 126 S.Ct. 704 (citing 28 U.S.C. § 1441). Making lawyers potentially liable for every erroneous removal would likely result in fewer removals altogether, including many meritorious ones. In close cases, lawyers may err on the side of caution, "exercis[ing] this right only in cases where the right to remove was obvious." *Id.* at 140, 126 S.Ct. 704. And "there is no reason to suppose Congress meant to confer a right to remove, while at the same time discouraging its exercise in all but obvious cases." *Id.*

14 Furthermore, holding counsel responsible under § 1447(c) could begin to transform what it means to practice law. A lawyer should not be required to risk personal liability merely for acting in a representational capacity or for seeking to place a client in a more favorable litigation posture. Generally, an attorney is held liable in a representational capacity only when he engages in misconduct-not for legal judgments. *See DeBauche v. Trani,* 191 F.3d 499, 511 (4th Cir.1999). The standard for imposing sanctions on legal judgment is high, usually requiring vexatiousness, malfeasance, bad faith, or the like. *See, e.g.,*28 U.S.C. § 1927; Fed.R.Civ.P. 11.

Thus, holding lawyers accountable under § 1447(c) would go too far. Erroneous removal need not entail misconduct. Questions of removal are often complicated, generating the most extensive

commentary in the most learned of treatises. *See, e.g.,* 14B & 14C Charles Alan Wright, Arthur R. Miller, et al., Federal Practice and Procedure, §§ 3721-40 (4th ed. & supp.2009); 29A Federal Procedure, Lawyer's Edition §§ 69:1 to 69:200 (2009). Erroneous removal might very well be the result of an honest but forgivable mistake of legal judgment or perhaps the product of a lawyer's operating at the behest of a client's desires and demands.

To be sure, no one wishes to encourage improper removals. Wrongful or erroneous removals impose their own litigious burdens on the system. As the Supreme Court has noted, "[t]he process of removing *831 a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources." *Martin v. Franklin Capital Corp.,* 546 U.S. 132, 140, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005). But fee-shifting by itself operates as a deterrent on such practices. To go further and expose attorneys to personal liability risks, as we have noted, equating professional judgment calls with misconduct and chilling legitimate exercises of the removal right.

1516 There are, however, cases where removal is not just erroneous but egregiously so. Where an attorney's decision to remove *is* particularly blameworthy, courts do not need § 1447(c) to impose sanctions. For example, courts have at their disposal Federal Rule of Civil Procedure 11, 28 U.S.C. § 1927, and their inherent powers, all of which may permit

awards of attorneys' fees against attorneys whose actions compromise standards of professional integrity and competence. "The power of a court over members of its bar is at least as great as its authority over litigants. If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (citations omitted).

We are asked here, however, to impose liability on lawyers solely on the basis of § 1447(c). We are asked further to import into law a species of liability that Congress has in no way seen fit to adopt. Lacking explicit direction from the legislative branch, we refuse to read § 1447(c) to authorize the imposition of legal fees upon attorneys for erroneous removals.

VI.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

Parallel Citations

52 Bankr.Ct.Dec. 147

Footnotes

*

Appellants argue that we must instead interpret § 1447(c) consistently with 28 U.S.C. § 1912 and Federal Rule of Appellate Procedure 38. Those provisions allow courts to award "just damages" and "single or double costs" resulting from frivolous appeals but, like § 1447(c), do not expressly articulate who must bear liability. Despite the provisions' failure to expressly include counsel, some courts have nevertheless indicated that attorneys may be liable under them. *See Oum v. INS*, 613 F.2d 51, 53 (4th Cir.1980); *Thomas v. Digital Equip. Corp.*, 880 F.2d 1486, 1490-91 (1st Cir.1989); *Am. Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1057 (D.C.Cir.1986) (per curiam); *Int'l Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1406-07 & n. 8 (9th Cir.1985); *Hughes v. Hoffman*, 750 F.2d 53, 55 (8th Cir.1984) (per curiam); *Bankers Trust Co. v. Publicker Indus., Inc.*, 641 F.2d 1361, 1368 (2d Cir.1981); *LeLaurin v. Frost Nat'l Bank*, 391 F.2d 687, 692 n. 4 (5th Cir.1968) (§ 1912 only).

For a number of reasons, however, we believe that these cases do not call into question the general presumption against attorney liability under fee-shifting statutes. First, not all of the cases squarely decided the issue. For example, this Court, in *Oum v. INS*, merely suggested that it might be willing to apply § 1912 and Rule 38 to counsel but did not have to address the issue since the government was not seeking fees from counsel. 613 F 2d 51, 53 (4th Cir.1980). Second, several of the cases relied in part on an additional statute, 28 U.S.C. § 1927, which *does* expressly permit sanctions against attorneys. *See Gallagher*, 782 F.2d at 1057;*Hughes*, 750 F.2d at 55;*Bankers Trust*, 641 F.2d at 1368. Finally, and most significantly, the language used in § 1912 and Rule 38 is strikingly less similar to § 1447(c) than the language in the statutes discussed above, which courts found not to encompass counsel. Section 1912 and Rule 38, unlike § 1447(c), are not true fee-shifting statutes at all, referring only to "just damages" rather than

"attorney fees." Therefore, in interpreting "similar fee provisions ... alike," *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 537, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994) (Thomas, J., concurring) (citations omitted), we are obligated to interpret § 1447(c) consistently with those similarly worded statutes that have consistently been found inapplicable to attorneys.

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2008 WL 5216243
Only the Westlaw citation is currently available.
United States District Court,
D. Maryland.

In re CRESCENT CITY ESTATES, LLC, Debtor.

Douglas S. Draper, et al., Appellants
v.

Mr Crescent City, LLC, et al., Appellees.

Civil Action No. MJG-08-2640.Dec. 9, 2008.

Attorneys and Law Firms

Mark Jerome Friedman, DLA Piper US LLP, William Hughes Murphy, Jr., The Murphy Firm, William Alden McDaniel, Jr., Bassel Bakhos, Law Offices of William Alden McDaniel Jr., Baltimore, MD, for Appellees.

Opinion

DECISION ON APPEAL

MARVIN J. GARBIS, District Judge.

*1 The Court has before it Appellants, Douglas S. Draper's and William J. Murphy's, interlocutory appeals1 from the Order of the Bankruptcy Court entered September 17, 2008 and the materials submitted relating thereto. The Court has held a hearing and had the benefit of the arguments of counsel.

I. *BACKGROUND*

In February 2007, Plaintiffs sued Defendants in the Circuit Court for Baltimore City asserting various claims. In August 2007, Defendant, Crescent City Estates, LLC ("CCE"), filed a voluntary bankruptcy petition in the Eastern District of Louisiana and timely filed a notice of removal to the Bankruptcy Court in the District of Maryland. In September 2007, Plaintiffs filed a Motion for Remand and for Attorney's Fees (under 28 U.S.C. § 1447(c)) for Wrongful Removal.

On March 14, 2008, the Bankruptcy Court entered an Order remanding the case to state court "with the exception of the request for attorney's fees." On March 25, 2008, Plaintiffs filed an Amended Motion to Remand asserting a claim for costs (including

legal fees) under 28 U.S.C. § 1447(c) against CCE's counsel, William J. Murphy, Esquire and Douglas S. Draper, Esquire ("Appellants"). Appellants sought dismissal of the claims against them, contending that 28 U.S.C. § 1447(c) did not provide authority for the imposition of liability on counsel.

On the record of proceedings on September 4, 2008, the Bankruptcy Court stated that it had authority to impose liability on counsel under 28 U.S.C. § 1447(c), was going to deny dismissal of the claims against Appellants and would proceed to resolve the pending motion. On September 17, 2008, the Bankruptcy Court entered its "Order Resolving Preliminary Issues ..." in which it denied dismissal of the attorneys' fee request and required further proceedings related thereto.

The Appellants sought leave to proceed with an interlocutory appeal from the Bankruptcy Court's September 17, 2007 Order. The Bankruptcy Court recommended that the Court accept the interlocutory appeal. Bankruptcy Certification [Document 10]. By Memorandum and Order Re: Interlocutory Appeal [Document 13] (the "Interlocutory Appeal Order"), the Court followed the recommendations of the Bankruptcy Court and granted Appellants leave to proceed with the instant interlocutory appeal.

II. *DISCUSSION*

Although the instant appeal is from the Bankruptcy

Court, the issue presented is not limited to bankruptcy cases. The question to be resolved is, whether, in connection with the remand of any case removed to federal court pursuant to 28 U.S.C. § 1447, a federal court can, by authority of 28 U.S.C. § 1447(c), impose liability for costs, including legal fees, upon the removing party's counsel.

The instant appeal does not present the question of whether, "no matter how groundless the removal or how egregious the conduct of an attorney in effecting [a] removal ... a federal court is powerless to order an award against the attorney ...." Appellees' Brief at 1-2. Rather, the issue is whether a federal court, even though it may be authorized to impose an award against an attorney by other authority,2 is also given authority to do so pursuant to § 1447(c). In more concrete terms, if a party does not seek sanctions against counsel for a removing party under Rule 11, can that party obtain an award of costs (including legal fees) by virtue of § 1447(c)?

*2 The instant appeal does not relate to the substantive merits of Plaintiff's claims against the Appellants.3 Hence, the question before the Court is whether, assuming that a federal court remanding a case determines that an attorney removed the case without an objectively reasonable basis4 for doing so, the federal court can-*under authority of Section 1447(c)*-impose liability for costs (including legal fees) upon counsel for the removing party.

The Court shall consider the statutory amendment at issue in light of the legislative history and

context.

A. *Judicial Decisions*

There are appellate decisions that can be viewed as indicating that if a statute does not expressly authorize an imposition of liability on an attorney (as distinct from a party) the statute would usually be held to not so authorize. *E.g. Roadway Exp.*, 447 U.S. at 761;*Healey v. Chelsea Resources, Ltd.*, 947 F.2d 611, 624 (2d Cir.1991) (stating that "absent some express provision such as that found in 28 U.S.C. § 1927, costs are assessed against parties, not against their attorneys"); *Zambrano v. City of Tustin,* 885 F.2d 1473, 1482 n. 28 (9th Cir.1989) ("When Congress has authorized the courts to award attorneys' fees, it has done so explicitly."). None, however, have addressed the question now presented.

A few lower courts have addressed the issue and have reached inconsistent conclusions. Some have interpreted § 1447(c) to authorize awards against attorneys. *See Polanco v. 21 Arden Realty Corp.*, 121 B.R. 425, 427-28 (S.D.N.Y.1990) (assessing expenses against counsel without analyzing § 1447(c); *Wisconsin v. Missionaries to Preborn,* 798 F.Supp. 542, 544 (E.D.Wis.1992) (stating that expenses may be imposed against counsel because "[a] contrary interpretation of § 1447(c) would be arguably inconsistent with both Rule 11, Federal Rules of Civil Procedure, and ethical rules of conduct for attorneys"); *Peraza v. Mazak,* 2008 WL 186613, *3

(M.D.Fla. Jan.18, 2008); *Saxon v. Thomas*, 2007 WL 1115239, *6 (W.D.La. Apr.12, 2007).

Other courts have held that § 1447(c) does not authorize the imposition of liability on attorneys. *See Marketplace Illustrated, Inc. v. Intrex Travel, Inc.*, 1993 WL 405494, *3 (W.D.N.Y. Nov.30, 1993) (noting that plaintiff "cit [ed] no case indicating that attorney fees for improper removal under § 1447(c) should be exacted from counsel ..." and "[t]herefore [counsel] will not be required to pay plaintiffs' attorney fees"); *Creek Ventures, LLC v. World Parts, LLC*, 2004 WL 1166642, *4 (W.D.N.Y. Apr.14, 2004) (refusing to impose expenses against counsel "because the authority to award sanctions against the attorney under [§ 1447(c)] is unclear").

B. *The Legislative Context*

Prior to the 1988 amendment of § 1447(c), a party seeking removal of a case from state to federal court was subject to 28 U.S.C. § 1446(d) providing, in pertinent part:

> Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not

removable or was improperly removed.

[*3] 28 U.S.C. § 1446(d) (1982).

Accordingly, under § 1446(d), a party improperly removing a case was subject to liability for "all costs and disbursements incurred" by the party obtaining remand. Payment of the liability was secured by the requisite bond.

Furthermore, Rule 11 provided, in pertinent part:

The signature of an attorney [on a filed paper] constitutes a certificate ... that the signer has read the ... paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

* * *

If a ... paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred

because of the filing of the ... paper, including a reasonable attorney's fee.
Fed.R.Civ.P. 11 (1983).

Accordingly, if an attorney signed a document effecting a wrongful removal, Rule 11 authorized the court to impose on the attorney *and the represented party* an appropriate sanction that could include the obligation to pay legal fees.

C. *The 1988 Amendment of § 1447(c)*

In 1988, Congress rescinded § 1446(d), thus eliminating the requirement that a removing party post a bond to satisfy a possible cost (including fee) award if remand were ordered.

Congress replaced the bond requirement in § 1446(d) with the following added to § 1447(c):

> ... An order remanding [an improperly remanded] case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

As stated in the House Judiciary Committee Notes regarding the rescission of § 1446(d):

> Subsection (b) (3) [P.L. 100-702, Section 1016] deletes 28 U.S.C. § 1446(d) and thereby abolishes the bond requirement associated with removal. The bond requirement imposes a cost that may be substantial to some litigants, and constitutes an additional procedural complication. A bond is not required on filing an action and should not be required on removal.

H.R.Rep. No. 100-889, at 72 (1988) *reprinted in* 1988 U.S.C.C.A.N. 5982, 6033.

The Committee Notes further stated that the purpose of the amendment of § 1447(c) was:

> to ensure that the court may order payment of actual expense caused by an improper removal. As noted above, this provision would replace the bond provision now set out in section 1446(d), which covers payment of 'all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.'

* * *

[*4] Moreover, the proposed amendment to section 1447(c) will ensure that a substantive basis exists for requiring payment of actual expenses incurred in

resisting an improper removal; civil rule 11 can be used to impose a more severe sanction when appropriate.
Id.

Accordingly, the legislative history tends to indicate that the purpose of the amendment to § 1447(c) was to substitute for a removing party's obligation to post a bond, authority to impose on the removing *party* the obligation to pay the types of costs that had been secured by the bond. Moreover, inasmuch as Rule 11 authorized sanctions upon a represented party for counsel's violation of the Rule, it was appropriate for the Committee to note that, in addition to § 1447(c) authority with regard to costs (including legal fees), Rule 11 authority was available for the imposition of more severe sanctions *on the removing party* when appropriate.
Indeed, it would have been unnecessary for Congress to amend § 1447(c) to add therein a redundant grant of authority to impose a sanction *on an attorney* effecting a wrongful removal since that authority already existed by virtue of Rule 11.5

D. *Textual Indications*

The text of the amendment to § 1447(c) is indicative that the provision was intended to affect a removing party and not counsel.

The amendment provides that "an order remanding the case may require payment of just costs ...." An order remanding a case to state court would

normally, if not inevitably, be contemplated as one that pertains to parties and not counsel.

Moreover, the remand order is sent to the state court so it may proceed with the case. It appears unlikely that Congress would wish a sanction imposed by a federal court against *an attorney* for filing a removal in federal court to be included in a remand order sent to a state court before which the attorney would not necessarily remain as counsel of record. It is far more likely that Congress intended any liability imposed on counsel to be made pursuant to Rule 11 and to be enforced by the federal court imposing the sanction.

In addition, an award of costs (including legal fees) under § 1447(c) is to be included in a remand order. However, § 1447(d) provides in pertinent part:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise 6

Thus, the statute says that a remand order imposing an award under § 1447(c) would not be subject to appellate review. This would be an odd provision in regard to counsel who, if sanctioned under Rule 11, would have appellate rights but if held liable under § 1447(c) would not.7

In sum, the Court concludes that the 1988 amendment of § 1447(c), in light of the statutory text in its legislative context, added authority to impose liability for costs (including legal fees) upon parties but not attorneys.

III. *CONCLUSION*

For the foregoing reasons:

[*5] 1. The Order of the Bankruptcy Court entered September 17, 2008 is REVERSED.

2. Judgment shall be issued, consistent herewith, by separate Order.

SO DECIDED.

Footnotes

1 By Memorandum and Order Re: Interlocutory Appeal [Document 13] (the "Interlocutory Appeal Order"), the Court followed the recommendations of the Bankruptcy Court and granted Appellants leave to proceed with the instant interlocutory appeal.

2 For example, Rule 11 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1927, the inherent authority of the Court. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980).

3 Essentially, Plaintiffs contend that Appellants did not have "an objectively reasonable basis", *see Martin v. Franklin Capital Corp.*, 546 U.S 132, 126 S Ct. 704, 163 L.Ed.2d 547 (2005), for attempting to remove the case and Appellants contend that they acted properly.

4 *Id.*

5 There does not appear to be a significant difference-if any practical difference at all-between the standard for imposition of a § 1447(c) cost award [no objectively reasonable basis, *Martin*, 546 U.S. at 136, 126 S.Ct. at ----] and a Rule 11 award [not grounded in fact and warranted by a good faith argument of law]. Moreover, § 1447(c) was amended five years prior to the 1993 amendment to Rule 11 imposing a 21 day "wait and see" obligation. Hence, in 1988, any authority to impose liability on counsel added to § 1447(c) would have been essentially identical to the then extant Rule 11 authority.

6 Except as to a 28 U.S.C. § 1443 removal.

7 A party, in contrast, would necessarily be proceeding in the case in state court and, presumably, could seek modification of the award as the state court proceeded with the case.

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IN THE UNTIED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CEDARSTONE BANK,
Plaintiff,
v.

NO. 3:08-566
JUDGE HAYNES

MUSIC CITY RV, LLC
and GARY ARMAGH
Defendants.

ORDER

ORDER Plaintiff, Cedarstone Bank a Tennessee corporation, filed this action originally in the Chancery Court for Davidson County, Tennessee against the Defendants Music City RV, LLC, a New York limited liability company and Gary Armagh, a Tennessee citizen and Music City's general manager. Plaintiff's claims arise from Plaintiff's provision of financing of Music City's sales of recreational vehicles at its Nashville location. Armagh served as Music City's general manger and also personally signed as a guarantor of Plaintiffs loans. Among the provisions of the Plaintiff's financing agreement was that the purchaser would maintain possession of the recreational vehicle in good working condition. Plaintiff alleges that in four sales there were fictional purchasers who did not buy the vehicles, but instead the Defendants converted the vehicles for their personal use and leased the vehicles. These

four loans defaulted and Plaintiff sought possession of the vehicles and recovery of damages caused by the default and the Defendants' conduct

The Defendants removed the action to this Court asserting diversity jurisdiction under 28 U.S.C. § 1332 and filed a motion to dismiss the Defendant Armagh as an unnecessary and dispensable party. (Docket Entry No.3)

Before the Court is the Plaintiff's motion to remand (Docket Entry No. 9) and motion for its attorney's fees (Docket Entry No.11), citing the defendants' improper and strategic removal to frustrate the enforcement of Plaintiff's contractual rights against both Defendants. Music City has since filed for bankruptcy. (Docket Entry No.23). The Court addresses first the Plaintiff's motion to remand to determine the appropriate Court for this controversy

The key issue is whether the joinder of Armagh in the state court was appropriate because without Armagh, there would be complete diversity of the parties. In a word, the defendants are contending that the joinder of Armagh was fraudulent. The removing party bears the burden to establish fraudulent joinder. Alexander v. Electronic Data Systems, 13 F.3d 940, 949 (6th Cir

1994). Any colorable basis for recovery against the non-diverse defendants precludes a fraudulent joinder. Coyne v. Am. Tobacco Co., 183 F.3d 488, 493 (6th Cir. 1999). Any ambiguities must be resolved in favor of remand. Id

From the Court's review of the state record, in addition to signing the loan documents as Music

city's general manager, Armagh also signed a personal guaranty for these loans. (Docket Entry No. 1, Notice of Removal, Attachment thereto State Court Complaint, Exhibit A). The Court concludes that under these circumstances, Plaintiff had clear legal claims against Armagh and the Defendants' position to justify removal is factually and legally frivolous

Under 28 U.S.C. § 1447, a remand order may require payment of costs and expenses incurred as the result of the removal. In these circumstances, the Court concludes that Plaintiff's motion for attorney fees and its costs incurred in the Defendants' wrongful removal of this action should be granted and in light of Music City's bankruptcy, these fees are awarded against defense counsel.

Accordingly, Plaintiff's motion to remand (Docket Entry No. 9) and motion for its attorney's fees (Docket Entry No.11) are GRANTED as to the defendant Armagh and Plaintiff is AWARDED its attorney fees and costs incurred in the removal and remand against the Defendants' counsel. Thus, this action is REMANDED to the Circuit Court of Davidson County, Tennessee for further proceedings against Armagh and this action is TRANSFERRED to the Bankruptcy Court as to the Defendant Music City

It is so **ORDERED**

ENTERED this 28th day of August, 2008

/s/_____
William J. Haynes, Jr.
District Judge

2008 WL 704379
Only the Westlaw citation is currently available.
United States Bankruptcy Court, D. Maryland,
at Baltimore.

In re CRESCENT CITY ESTATES, LLC, Debtor(s).

Mr Crescent City, LLC, et al., Plaintiff/Movant(s)
v.

Giannasca Crescent City, LLC, et al.,
Defendant/Respondent(s).

Bankruptcy No. 07-11598.Adversary No.
07-00662DK.March 13, 2008.

Attorneys and Law Firms

Crescent City Estates, LLC, pro se.

David V. Adler, Metairie, LA, pro se.

Edward H. Arnold, III, Baker Donelson Bearman
Caldwell Berkowit, New Orleans, LA, for Trustee.

Opinion

MEMORANDUM OF DECISION

DUNCAN W. KEIR, Bankruptcy Judge.
*1 This matter was commenced as a case filed in the Circuit Court for Baltimore City by the filing of a Complaint by the Plaintiffs against the Defendants on or about February 23, 2007. Six months later on August 24, 2007 a Notice of Removal was filed removing this matter from the Circuit Court for Baltimore City to the United States Bankruptcy Court for the District of Maryland. It was then assigned Adversary Proceeding number 07-00662DK.1

The matter now captioned as Adversary Proceeding number 07-00662 is hereinafter referred to as "this Adversary Proceeding." The basis for removal was asserted as federal jurisdiction under 11 U.S.C. § 1334 and the removal statute for matters related to a bankruptcy case set forth in 28 U.S.C. § 1452.

The bankruptcy case which forms the asserted relation to this Adversary Proceeding and the basis for removal to this court is the case of *In re Crescent City Estates LLC ("Debtor")*, 07-11598-JAB now a Chapter 7 case in the United States Bankruptcy Court for the Eastern District of Louisiana. The Debtor is both a co-plaintiff and co-defendant in the Complaint as filed in the Circuit Court for Baltimore City. That case was filed as a Chapter 11 case in Louisiana on August 23, 2007, the day before this Adversary Proceeding was removed to this court. The petition instituting the bankruptcy case in

Louisiana was signed by Edward V. Giannasca, II (one of the Defendants in this adversary proceeding), as manager of the Debtor.

Less than four hours after the Notice of Removal brought this Adversary Proceeding to this court, the removing parties, Defendants in this Adversary Proceeding, filed a motion to transfer the venue of this Adversary Proceeding to the United States Bankruptcy Court for the Eastern District of Louisiana. The Plaintiffs on September 7, 2007, filed a Motion for Remand requesting this court to return this Adversary Proceeding to the Circuit Court for Baltimore City. The Plaintiffs and Defendants respectively filed oppositions to the motions brought by their opponents.

On October 2, 2007, a hearing was held to consider the opposing motions and responses, as well as a Status Conference in this Adversary Proceeding. At the conclusion of that hearing, the court took the motions under advisement for the reasons that the court enunciated onto the record.2 At the time of the hearing on October 2, 2007, Crescent City Estates, LLC was a debtor-in-possession in the Chapter 11 case in the Eastern District of Louisiana. Almost immediately after the bankruptcy case was commenced, the debtor-in-possession filed a proposed disclosure statement and plan pursuant to which an independent liquidating trustee would be appointed. One of the duties of that trustee would have been to determine which of the causes of action brought derivately on behalf of the Debtor in this

Adversary Proceeding should be pursued (if any) and otherwise to determine how the Debtor should participate as a plaintiff or defendant in the action. At the same time, a non-derivative plaintiff in this Adversary Proceeding filed a motion in the Eastern District of Louisiana to dismiss the bankruptcy case. *2 As reflected by this court's findings at the hearing on October 2, 2007 upon the motions to transfer and remand, the status of the bankruptcy case in Louisiana and possibility of confirmation of the plan proposed by the debtor-in-possession therein were important factors in this court's decision to defer its ruling. Subsequent to the October 2, 2007 hearing, the Debtor converted its Chapter 11 case in Louisiana to a Chapter 7 case and a Chapter 7 Trustee has been appointed. The proposed plan to have an independent Chapter 11 trustee is no longer a possibility. For the reasons enunciated hereinafter, this court determines that further delay in deciding the motion to transfer and motion to remand serves no useful purpose. For the reasons set forth hereinafter, this court will order that this Adversary Proceeding be remanded to the Circuit Court for Baltimore City and that the motion to transfer venue of this case as a federal action to the United States Bankruptcy Court for the Eastern District of Louisiana, be denied.3

As commented upon by this court in its findings on the record on October 2, 2007, the actions contained in the pleadings filed by the Plaintiff against the Defendants can be grouped based upon the parties asserting those claims and parties against whom such claims are asserted. As to the Plaintiffs, the

Debtor is named as a Plaintiff for the purpose of the co-Plaintiffs bringing derivative actions in the name of that entity. The remaining Plaintiffs, which the court has referred to at times as "non-debtor Plaintiffs," also bring causes of action in their own asserted right and not derivatively on behalf of the Debtor. As to Defendants, the Debtor is also named as a Defendant. The remaining Defendants are individuals and entities allegedly controlled by those individuals and are not debtors in a bankruptcy case (hereinafter referred to as the "non-debtor Defendants).4

As the court previously stated on October 2, 2007, it appears highly questionable that this court has subject matter jurisdiction over those causes brought by the non-debtor Plaintiffs against the nondebtor Defendants. 11 U.S.C. § 1334 confers federal bankruptcy jurisdiction upon the federal courts including jurisdiction over matters related to a bankruptcy case.5 The Defendants in this action assert that all of the causes of action brought by all Plaintiffs are "related to" the bankruptcy case of the Debtor. However, this appears to be most unlikely in the manner those words have been interpreted by the United States Supreme Court. To the extent that any of the non-debtor Defendants are found liable to any of the non-debtor Plaintiffs for causes of action that are not derivative, the outcome of such causes of action appears to have no likely effect upon the bankruptcy estate of Crescent City Estates, LLC or the rights of the Debtor in that bankruptcy case.6 "[B]ankruptcy courts have no jurisdiction over

proceedings that have no effect on the debtor." *Celotex Corp. v. Edwards*, 514 U .S. 300, 308 (1995)(footnote 6).

*3 In short, " 'the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.*' " *Owens-Ill., Inc. v. Rapid Am. Corp. (In re Celotex (Corp.)*, 124 F.3d 619, 625 (4th Cir.1997) (quoting *Pacor*, 743 F.2d at 994). Therefore, "[a]n action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and [it] in any way impacts upon the handling and administration of the bankruptcy estate." *Id.* at 625-26; *see also Spartan Mills v. Bank of Am. Ill.*, 112 F.3d 1251, 1255-56 (4th Cir.1997). *Valley Historic Ltd. Partnership v. Bank of New York*, 486 F.3d 831, 836 (4th Cir.2007). It thusly appears that the causes of action brought by the non-derivative Plaintiffs against the non-derivative Defendants cannot be determined by a bankruptcy court either in Baltimore, Maryland or in the Eastern District of Louisiana.

In arguing against this result, the Defendants assert that the causes of action are so intertwined as to all constitute an action in some manner seeking to avoid a transfer related to the bankruptcy case. This argument asks the court to presuppose the result of what Defendants assert they will be able to ultimately prove. Certainly from the pleadings it

does not appear to be a result which this court can assume. If the non-debtor Plaintiffs have no separate rights to be pursued, that decision can be made by the court having subject matter jurisdiction, upon proper motion, or at trial as necessary. To presume that the non-debtor Defendants would prevail in this assertion that there is no sustainable cause of action to be remanded, is at best premature.

Because the actions brought non-derivatively by the non-debtor Plaintiffs against non-debtor Defendants must be tried in a court having subject matter jurisdiction not emanating from the bankruptcy case of the Debtor, this court also observes that the only opportunity for all matters as to all parties to be resolved in one forum is before a non-federal court, i.e., Circuit Court for Baltimore City. The non-derivative actions of the non-debtor Plaintiffs against the non-debtor Defendants are not stayed by the filing of the bankruptcy of the Debtor and may move forward in the Circuit Court for Baltimore City.

Actions brought against the Debtor are stayed by the automatic stay imposed by 11 U.S.C. § 362(a). However, it is possible they will not remain stayed for purposes of adjudicating the rights set forth in the causes of action in which the debtor is the Defendant. Rights of asserted creditors against an entity which becomes a debtor in bankruptcy become the subject of claims filed in the bankruptcy case. The debtor or other party-in-interest can test legitimacy or amount of such claims by objections filed in the bankruptcy court. However, when a

non-bankruptcy proceeding is pending at the time the bankruptcy is filed which non-bankruptcy proceeding includes the dispute set forth in the subsequent objections to claims, the bankruptcy court upon motion may determine whether it should modify the automatic stay to allow the non-bankruptcy court to adjudicate the dispute. The existence of liability and the amount of damages (if any) are then determined by the non-bankruptcy court. That determination, by preclusion, becomes the basis for allowance or disallowance of the claim in the bankruptcy case. Whether this path will be followed is entirely up to the United States Bankruptcy Court for the Eastern District of Louisiana to decide, as that court has exclusive jurisdiction of the bankruptcy case of the Debtor and the automatic stay arising therein .7

*4 As to those causes of action asserted derivatively through the Debtor, as a plaintiff, the parties agree that the only person with standing to assert such causes of action is the Chapter 7 Trustee of the bankruptcy estate of the Debtor.8 The state courts of Maryland are not strangers to this situation. For example, see *Adams v. Manown*, 328 Md. 463, 615 A.2d. 611 (Md.1992).

Depending upon what action (if any) is determined by the Bankruptcy Court in the Eastern District of Louisiana as to the automatic stay which presently prevents actions against the Debtor from moving forward as a part of this Adversary Proceeding now being remanded, and depending upon what action (if

any) the Chapter 7 Trustee takes as to any rights which the Debtor as Plaintiff may have in this Adversary Proceeding, there is the possibility that a trial to determine all transactional facts may be held in one forum at one time. However, because the federal courts appear to lack subject matter jurisdiction as to the causes of action brought by the non-debtor Plaintiffs against non-debtor Defendants, there is no possibility of one trial determining all transactional facts while this matter remains in a federal forum. All of the policies discussed in this court's findings at the hearing on October 2, 2007 remain unchanged and further support the decision which the court now makes as to where this proceeding should continue forward.

The matter remanded does not include the one remaining unresolved relief prayed for in the Motion to Remand. Moving Plaintiffs include in that Motion a request for attorney's fees. The oppositions filed by Defendants oppose any such award. This question remains before this court to be determined. To the extent that the moving Plaintiffs request an award of attorney's fees as against the Debtor Crescent City Estates, LLC, that determination remains stayed by 11 U.S.C. § 362(a). As against the non-debtor Defendants, the record on the request for attorney's fees is not sufficiently developed as to enable the court to determine the dispute without further hearing. Accordingly by separate Order, the court will set the disputed request for attorney's fees for hearing by this Court.

As to the Adversary Proceeding itself, with the exception of the request for attorney's fees, an order will be entered which will remand this action to the Circuit Court for Baltimore City.

Footnotes

1

Because the bankruptcy is referred to as the "case," separate civil proceedings arising under, arising in, or related to the case are referred to as "adversary proceedings," (including an action brought to this court by removal) even though such a proceeding would be known as a "case" in a non-bankruptcy court. See 28 U.S.C. § 1334(b) and Federal Rule of Bankruptcy Procedure 7001.

2

A transcript of those findings is filed in this Adversary Proceeding as paper no. 111.

3

Although the Court's decision to remand this Adversary Proceeding is for the reasons stated in this Memorandum. In addition, it appears that this matter may not have been removed by a Notice of Removal that was lawfully filed in the federal court, as required. The Notice of Removal purporting to remove the action was ostensibly filed by Crescent City Estates, LLC, defendant and not by any of the other defendants, who merely filed consents to the removal. As Crescent City Estates, LLC is not an individual person, it could only file a pleading by authorized counsel. The Notice of Removal filed by Crescent City Estates, LLC was signed by two attorneys: Douglas S. Draper, Esq. And Michael J. Murphy, Esq.

At the time with the filing of the Notice of Removal, Crescent City Estates, LLC was the Debtor-in-Possession

in the Chapter 11 case upon which removal was predicated. 11 U.S.C. § 327 requires that a Debtor-in-Possession must apply for and obtain an order from the Bankruptcy Court (in this case in the Eastern District of Louisiana) authorizing the employment of counsel. As to Attorney Draper, an application for authorization to be employed as counsel to Crescent City Estates, LLC was filed in the United States Bankruptcy Court for the Eastern District of Louisiana on September 4, 2007 requesting approval nunc pro tunc as of the date of filing of the Bankruptcy Petition on August 23, 2007. This application was granted nunc pro tunc by Order entered October 16, 2007. However Attorney Draper was not a member of the federal bar of the District of Maryland and at the time of the filing of the Notice of Removal could not file such a document in this court as the sole counsel.

Attorney Murphy was admitted to practice in this District. However it appears that Attorney Murphy was never the subject of any application by Crescent City Estates, LLC for authority to employ counsel and no order granting such authority has been entered by the Bankruptcy Court in Louisiana. Accordingly Attorney Murphy was not lawful counsel to Crescent City Estates, LLC. His signature upon the Notice of Removal therefore appears to be ultra vires. It is noted that Attorney Murphy filed numerous pleadings in this Adversary Proceeding on behalf of Defendant Giannasca individually. In Giannasca's response to the Motion to Remand, it is clearly stated that Giannasca was not the party that invoked removal by the filed Notice.

4 On November 14, 2007 the non-debtor Plaintiffs filed a motion for leave to file Fourth Amended Complaint. The Fourth Amended Complaint offered with that motion sought to delineate

which causes of action were asserted non-derivitively and as to which group of Defendants (debtor or non-debtor Defendants). An opposition to that Motion was filed by Defendants Fisher and Giannasca asserting that permitting the Complaint to be amended in such fashion could not be done without the consent of the Debtor, Crescent City Estates, LLC. The Motion to File Amended Complaint has not been decided before the remand of this case to the Circuit Court for Baltimore City.

5

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11. 28 U.S.C. § 1334(a) and (b).

6

Because the debtor is not an individual person, the debtor cannot receive a discharge in the

Chapter 7 case. 11 U.S.C. § 727(a)(1).

7 In addition there is pending before the Bankruptcy Court for the E.D. of Louisiana a motion to dismiss the bankruptcy case. If that motion is granted, the automatic stay would terminate.

8 The Chapter 7 Trustee has filed a motion in the bankruptcy case before the Bankruptcy Court in the E.D. of Louisiana to engage special litigation counsel to represent the trustee in this adversary proceeding. Defendants herein have filed an objection and the matter is pending before the Court in the E.D. of Louisiana.

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(2)

NO. 09-1086

IN THE

SUPREME COURT OF THE UNITED STATES

MR CRESCENT CITY LLC, *et al.*,
Petitioners,

v.

DOUGLAS S. DRAPER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

The federal removal statute, in 28 U.S.C. § 1447(c), provides that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The question presented is whether the Court of Appeals erred in affirming the District Court's ruling that this statute does not authorize the courts, upon entering an order of remand, to impose awards of attorney's fees and costs against counsel for removing parties.

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OPINIONS BELOW

The Petition erroneously includes an unreported decision of the United States District Court for the Middle District of Tennessee as one of the "opinions below" in this case. Pet. 1. (Petitioners reprinted this decision in the Appendix at A34.) That decision is not one of the "opinions and orders entered in the case." S. Ct. R. 14.1(d).

The Petition also neglects to include the order of the United States Bankruptcy Court for the District of Maryland that was the subject of the appeal in this case. That unreported order would be cited as *In re Crescent City Estates (MR Crescent City LLC* v. *Giannasca Crescent City LLC)*, Adv. No. 07-662 (Bkrtcy. D. Md. Oct. 22, 2008) (order resolving preliminary issues and requiring Rule 26(f) report). A copy of the order is reprinted in the Appendix to this brief at A1.

STATEMENT OF THE CASE

In February 2007, Michael McCrary and two entities he owned, MR Crescent City LLC and McCrary Crescent City LLC (collectively "McCrary") filed an action in the Circuit Court for Baltimore City against Stuart C. ("Neil") Fisher, Edward V. Giannasca II, Crescent City Estates LLC ("CCE"), and others. McCrary alleged that Mr. Fisher and Mr. Giannasca had misappropriated some $12 million in insurance proceeds payable to CCE. CCE was a Louisiana limited liability company, formed to acquire the Plaza Tower office building in New Orleans, with the intention of converting it to residential condominiums. McCrary claimed that he owned 50 percent of CCE and therefore was entitled

to a proportionate share of the insurance proceeds. Messrs. Fisher and Giannasca claimed that Mr. Fisher had acquired full ownership of CCE and therefore he alone was entitled to the insurance proceeds.

Respondent William J. Murphy began representing Mr. Fisher in May 2007, after Mr. Fisher's prior counsel withdrew. Mr. Murphy began representing Mr. Giannasca in June 2007 after Mr. Giannasca, who previously had no counsel, was held in default. Through the summer of 2007, Mr. Murphy and his firm made extraordinary efforts to bring their clients into compliance with discovery obligations and outstanding court orders. The clients made the task exceedingly difficult.

Mr. Fisher and Mr. Giannasca consistently maintained that the litigation belonged in Louisiana, where the Plaza Tower was located and where CCE was formed. On August 23, 2007, CCE, represented by respondent Douglas D. Draper, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Louisiana. CCE then removed the Baltimore City action to the United States District Court for the District of Maryland, where it was automatically assigned to the Bankruptcy Court. The Notice of Removal relied on 28 U.S.C. § 1452, which permits removal of "any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." Section 1334 creates exclusive jurisdiction in the district courts for "all cases under title 11," and original but not exclusive jurisdiction of "all civil

proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334. Thus, the Bankruptcy Court had jurisdiction over the state-court litigation to the extent it involved claims by or against CCE, and the Complaint included an express derivative claim brought by McCrary on behalf of CCE. The Notice of Removal also asserted that the Bankruptcy Court had jurisdiction over all other claims in the case because the Complaint sought return of the insurance proceeds (or damages for conversion of the insurance proceeds), and the insurance proceeds plainly belonged to the debtor CCE in the first instance.

CCE moved to transfer the action to the Louisiana Bankruptcy Court, and Mr. McCrary opposed the motion. On September 7, 2007, Mr. McCrary filed a motion to remand, which sought fees from defendants Fisher and Giannasca pursuant to 28 U.S.C. § 1447(c) – but not from attorneys Draper and Murphy (hereafter, "Attorneys").

On October 2, 2007, Judge Keir of the Maryland Bankruptcy Court held a hearing on the motion to remand. He observed that at least part of the case was removable, but decided to await the outcome of a pending motion to dismiss the bankruptcy in Louisiana before ruling on the motion to remand. On March 14, 2008, however, Judge Keir entered an order remanding the case to the Circuit Court for Baltimore City "with the exception of the request for attorney's fees."

The parties (through other counsel) litigated various issues in the Louisiana Bankruptcy Court, including the authority of Mr. Fisher and Mr. Giannasca to have filed a petition for relief on behalf

of CCE. Neither Respondent was materially involved in those proceedings. On March 20, 2008, the Louisiana Bankruptcy Court dismissed the CCE bankruptcy case after a three-day hearing. In a written order dated March 25, 2008, the Court held that Mr. Giannasca and Mr. Fisher did not have authority to file the petition for relief on behalf of CCE.

On March 24, 2008, Mr. Murphy sent notice to his clients stating his intention to withdraw as their counsel. Judge Keir granted Mr. Murphy's motion to withdraw on April 7, 2008. Mr. Murphy also withdrew as counsel for his clients in the state-court litigation. Mr. Draper had withdrawn as counsel for CCE several months before the remand order. By neglecting to mention these facts, the Petition wrongly implies that the Attorneys were involved when the Baltimore City Circuit Court entered a $33 million judgment against Fisher and Giannasca (later vacated on appeal). The Petition also wrongly implies that the state court judge's commentary – which is not part of the record below – was somehow directed at the Attorneys.

On March 25, 2008, McCrary filed an "Amended Motion to Remand" which asserted, for the first time, a claim for attorney's fees in the approximate amount of $167,000 against Attorneys Draper and Murphy. The amended remand motion, like the original version, was predicated solely on 28 U.S.C. § 1447(c).

Attorneys Draper and Murphy filed separate oppositions to the amended remand motion, raising several preliminary issues aimed at the Bankruptcy Court's power to award fees against them, including

the issue decided in the appeals below. After briefing and a hearing, Judge Keir entered an order denying the preliminary issues raised by the Attorneys.

The Attorneys filed separate motions for leave to appeal to the District Court pursuant to 28 U.S.C. § 158(a). Judge Keir certified the appeal pursuant to local procedure, and District Judge Garbis granted leave to appeal. After full briefing and oral argument, Judge Garbis issued a written opinion and order reversing Judge Keir's order, and entering judgment on behalf of the Attorneys. Judge Garbis recognized the general principle that federal fee-shifting statutes do not authorize awards against counsel unless the text of the statute says so expressly. He concluded that the legislative history supported the view that Congress did not intend to authorize awards against counsel through section 1447(c), but rather that Congress expected counsel's conduct in removal proceedings to be governed by Rule 11 of the Federal Rules of Civil Procedure. Pet. A30. He also found that the text of section 1447(c) applied to parties, not counsel. Pet. A30-31.

McCrary appealed to the Court of Appeals for the Fourth Circuit. In a published decision written by Judge Wilkinson, the Court of Appeals ruled unanimously that § 1447(c) does not authorize an award of costs and fees against counsel for a party. The Court's comprehensive opinion considered the statutory text, the legislative history, the presumption against fee-shifting embodied in the "American Rule," a decision of this Court effectively holding that a fee-shifting statute applies only to parties unless the text refers to counsel, decisions of numerous courts of appeals reaching the same conclusion in the context of other fee-shifting

statutes, the interaction of § 1447(c) with other fee-shifting provisions that clearly do apply to counsel (like Rule 11), and the public policy implications of applying the statute to counsel. All these factors pointed in the same direction, and the Court of Appeals readily concluded that the District Court's judgment should be affirmed.

REASONS WHY THE WRIT SHOULD BE DENIED

The Petition falls far short of this Court's controlling standards for certiorari. Petitioners' attempt to manufacture a split among the federal courts of appeals is frivolous. Their argument that the Court of Appeals in this case misinterpreted the statute, and misapplied other principles of federal law, is flawed by a failure to analyze what the Court actually said. The decision below is comprehensive, thoughtful, and persuasive. It is by far the most thorough discussion of the issue by any court or commentator thus far and, as the Court and the parties below all recognized, it is the *only* appellate decision on point. The next three most serious considerations of the issue are the District Court's decision in this case, and two other district court decisions it followed. The district court decisions cited by Petitioners throughout this matter are all rote applications of a single, highly unpersuasive district court decision. There was never a conflict in the circuits and, after the comprehensive decisions below, there is no meaningful conflict in the law at all. Finally, Petitioners have failed to demonstrate why the unusual factual posture of this case gives

rise to a question of federal law that is important enough to compel review by this Court.

I. The Court of Appeals' Decision is not in Conflict with any Other Appellate Decision.

It is untrue that the Court of Appeals' decision "conflicts with other circuit courts," something the Petitioners state in a section heading but fail to support in the Petition text. Pet. 12. The Court of Appeals itself correctly observed in its published decision that "[a]s of yet, no circuit court has confronted this issue." Pet. A4. Petitioners did not argue below that any other federal appellate court had decided the issue, but they now cite two unpublished decisions of the Court of Appeals for the Sixth Circuit and one published (but inapposite) decision from the Court of Appeals for the Ninth Circuit.

It is not hard to see why these cases were not cited by the parties or the courts below. In *Taylor* v. *Currie*, 208 Fed. Appx. 401 (C.A. 6 2006), the court's unreported per curiam decision affirms an award against counsel under *three* federal authorities: Rule 11, 28 U.S.C. § 1927, and 28 U.S.C. § 1447(c), without analyzing any one of them or even distinguishing among them. Rule 11 and § 1927, of course, expressly permit fee awards against counsel, but the standards and procedures under those provisions are not the same as those under § 1447(c) (as the Court of Appeals in this case recognized). The *Taylor* court's two-paragraph opinion bears no indication that the court or the parties contemplated whether the three statutes were governed by different standards. The district court's decision in

Taylor is not reported even by an electronic service, so anyone who wanted to understand the appellate court's reasoning would have to retrieve the unpublished order from the Pacer system, and even then would find no analysis of whether § 1447(c) alone permits a fee award against counsel.

In *Cedarstone Bank* v. *Music City RV, LLC*, 2009 W.L. 4307582 (C.A. 6 2009), the court held only that it had no jurisdiction to consider the appeal. The opinion contains no hint that the court contemplated whether § 1447(c) permits a fee award against counsel.[1] Petitioners' assertion that "the circuit court clearly had no intention of deviating from *Taylor*" (Pet. 16) – the unreported two-paragraph per curiam decision that itself contains no analysis of § 1447(c) – finds no support in the opinion.

Finally, in *In re DeVille*, 361 F.3d 539 (C.A. 9 2004), the bankruptcy court had *declined* to award sanctions under § 1447(c), and the appellate court merely noted that fact. The decision contains no discussion of a court's authority to award fees against counsel under § 1447(c). In short, Petitioners have not shown any conflict in the circuits at all, much less a significant conflict over an important question of federal law that should be resolved by this Court.

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[1] In this instance, Petitioners *did* retrieve the unpublished district court decision from Pacer, and they cite that decision, not the court of appeals' decision, as evidence of a conflict. But the district court decision, reprinted in the Petitioner's Appendix, likewise contains no analysis of the question presented here. *See* Pet. A34.

II. The Conflicting District Court Decisions are not Well-Considered.

Petitioners continue to rely on a cluster of perfunctory district court decisions that awarded fees against counsel under § 1447(c). The Court of Appeals recognized that the district court cases were divided, Pet. A4, but it prudently declined to address the conflicting district court rationales, most likely because no district court had advanced a persuasive rationale to justify fee awards against counsel. Most of the cases simply cite *Wisconsin* v. *Missionaries to the Preborn*, 798 F. Supp. 542 (E.D. Wis. 1992), a decision that itself contains almost no analysis. The *Missionaries* court merely stated that § 1447(c) would be inconsistent with Rule 11 if it did not permit fee awards against counsel. The decision does not demonstrate that § 1447(c) and Rule 11 were intended to be consistent, nor offer a rationale for why they should be interpreted in a consistent fashion. In fact, the standards and purposes of the two rules are not identical. *E.g.*, *Moore* v. *Permanente Med. Group, Inc.*, 981 F.2d 443, 447 (C.A. 9 1992) (rejecting an argument that "fee awards against clients pursuant to section 1447(c) should be judged by the same standard as fee awards against attorneys under Rule 11").

In *Polanco* v. *21 Ardent Realty Corp.*, 121 B.R. 425 (S.D.N.Y. 1990), the entire opinion construing § 1447(c) is a single sentence containing no analysis at all. The court simply stated that, "[s]ince the removal was costly to the petitioner and her counsel, fees are hereby assessed pursuant to 28 U.S.C. § 1447(c) against [the lawyer and client] in the total amount of $2,500 . . . for wrongful removal of this

case." 121 B.R. at 428. The remaining district court decisions relied upon by Petitioners generally are unpublished and cursory orders. At most they rely solely on the *Missionaries* case, without independent analysis. *See Saxon* v. *Thomas*, 2007 W.L. 1115239 (W.D. La. Apr. 12, 2007), *aff'd*, 2007 W.L. 1974914 (W.D. La. June 29, 2007); *Game Time Laser Tag Adventure LLC* v. *MillsServices Corp.*, 2006 W.L. 2422593 (S.D. Ohio Aug. 22, 2006); *Peraza* v. *Mazak*, 2008 W.L. 186613 (M.D. Fla. Jan. 18, 2008).

By contrast, two earlier district court decisions have concluded that § 1447(c) does *not* authorize a fee award against counsel, and those decisions relied on appellate precedent holding that fee-shifting statutes do not apply to counsel without some express indication in the text. *See Creek Ventures LLC* v. *World Parts, LLC*, 2004 W.L. 1166642 (W.D.N.Y. 2004) and *Marketplace Illustrated, Inc.* v. *Intrex Travel, Inc.*, 1993 W.L. 405494 (W.D.N.Y. 1993). The District Court in this case also relied on that principle, and much more. In short, although the district court decisions were divided, the better reasoned decisions supported Respondents' view, and they presaged the holding reached by the Court of Appeals in this case. To the extent there was a conflict in the district courts, that conflict is hardly live or genuine after the Court of Appeals' thorough and persuasive decision in this case.

III. The Decision Below Accurately Interpreted the Statutory Text and Congressional Intent.

In their lead argument for review by this Court, Petitioners contend that the decision below

misinterprets "federal law" and is inconsistent with congressional intent. The federal law at issue apparently is this Court's decision in *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132 (2005), but that case had nothing to do with whether § 1447(c) authorizes a fee award against counsel. Petitioners' main contention is that the Court of Appeals misinterpreted the legislative intent when Congress amended the removal statutes in the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 1016, 102 Stat. 4642 (Nov. 19, 1988). Even if true, such an issue of statutory interpretation concerning a procedural matter would not alone present a compelling ground for certiorari.

But Petitioners' contention about legislative intent is not well-founded. The Court of Appeals, unlike Petitioners, engaged in a rigorous statutory analysis, beginning with the plain text of § 1447(c). The Court acknowledged that "the statutory text does not explicitly forbid fee awards against counsel," but concluded that "it does so implicitly." The Court explained that a fee award under § 1447(c) must accompany "[a]n order remanding the case," Pet. A9, which, as both the District Court and Court of Appeals observed, "would normally, if not inevitably, be contemplated as one that pertains to parties and not counsel." *Id.* Thus, "the most natural reading of § 1447(c) is that it applies solely to litigants, who have a genuine stake in whether or not the case is remanded – and not to attorneys, who may not even remain involved in the case post-remand." *Id.* The Court cited in support of its reasoning several decisions of this Court, all of which are ignored by Petitioners. Pet. A9-A10.

The Court of Appeals also provided a persuasive view of the legislative history that buttressed its reading of the text. The Court's analysis is grounded in concrete principles of statutory construction, rather than a fuzzy view of overall congressional "intent." The Court pointed out that the prior version of the statute required a removing party to post a removal bond as security for costs against a wrongful removal. The bond requirement applied only to parties and not to counsel, and nothing in the text or history of the statute suggested that Congress intended to modify that principle. The Court observed that throughout the legislative process Congress never mentioned imposing liability against counsel, and it would "def[y] common sense to think that Congress wished to expand fee liability to encompass lawyers but failed to say anything at all about that wish, at any point, during the statute's consideration." The Court cited a closely analogous decision of this Court for the proposition that "[s]uch a bold departure from traditional practice would have surely drawn more explicit statutory language and legislative comment." Pet. A10 (citing *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 534 (1994)).

Finally, the Court below relied on this Court's American Rule precedents prohibiting fee-shifting absent a clear indication of congressional intent. The Court explained that under the American Rule, fee-shifting statutes are narrowly construed because they are in derogation of the common law. Pet. A7. Because parties rather than counsel ordinarily obtain the benefits and incur the costs of litigation, the American Rule implies that parties should remain responsible under a fee-shifting statute unless counsel are mentioned. Again, Petitioners do

not cite the precedents of this Court upon which the Court of Appeals relied, much less explain why they are inapposite.

IV. The Decision Below Conforms to Precedents of this Court and of Other Appellate Courts Interpreting Similar Statutes.

In *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980), this Court considered fee-shifting under 42 U.S.C. § 1988 and § 2000e-5(k). The text of these statutes is materially indistinguishable from § 1447(c): all three permit fee-shifting without indicating who is obligated to pay the fees. In *Roadway*, this Court concluded that neither § 1988 nor § 2000e-5(k) authorized an award against counsel, because neither statute "makes any mention of attorney liability for costs and fees." 447 U.S. at 761. The Court of Appeals concluded that *Roadway* "fairly stands for the more general proposition that, presumptively, when a fee-shifting statute is silent about who pays attorneys' fees, parties – not attorneys – are accountable." Pet. A12. Petitioners do not mention *Roadway*.

Nor do Petitioners mention decisions from numerous federal courts of appeals all holding, "in a wide array of contexts," that fee-shifting statutes do not apply to counsel unless the statutory text so indicates. Pet. A13 (citing *Amlong & Amlong, P.A.* v. *Denny's, Inc.*, 500 F.3d 1230, 1238 (C.A. 11 2007); *Steinert* v. *Winn Group, Inc.*, 440 F.3d 1214, 1222 (C.A. 10 2006); *Foster* v. *Mydas Assocs., Inc.*, 943 F.2d 139, 142 (C.A. 1 1991); *Brown* v. *Borough of Chambersburg*, 903 F.2d 274, 276-77 (C.A. 3 1990);

Healey v. Chelsea Res., Ltd., 947 F.2d 611, 624 (C.A. 2 1991); *Pfingston* v. *Ronan Eng'g Co.*, 284 F.3d 999, 1005-06 (C.A. 9 2002); *Heckethorn* v. *Sunan Corp.*, 992 F.2d 240, 242 (C.A. 9 1993); *Crescent Publ'g Group, Inc.* v. *Playboy Enters., Inc.*, 246 F.3d 142, 150 (C.A. 2 2001). Together with the Court of Appeals' decision in this case, the federal appellate courts uniformly agree that fee-shifting statutes in the nature of § 1447(c) do not apply to counsel. There is no conflict among the appellate courts warranting review by this Court.[2]

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[2] In their reply brief in the Court of Appeals, Petitioners for the first time analogized their position to the availability of fees against counsel pursuant to Rule 38 of the Federal Rules of Appellate Procedure and its affiliated statute, 28 U.S.C. § 1912. (Petitioners also cite those provisions in the Petition.) As the Court of Appeals pointed out, however, Rule 38 and § 1912 are "not true fee-shifting statutes," like § 1988 and the other statutes discussed in the cases cited above. Following this Court's precedent, the Court of Appeals concluded that it should interpret "similar fee provisions . . . alike." Pet. A20 (quoting *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 537 (1994)). In addition, Rule 38 and § 1912 apply only on appeal, where the purposes and effect of fee-shifting are often quite different than during trial proceedings. Moreover, because Rule 11 does not apply on appeal, *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 3[illegible], 407-08 (1990), this Court has read Rule 38 as the basis for appellate fee-shifting, suggesting that the two rules should be interpreted similarly. *See id.* Rule 11, of course, explicitly applies to attorneys, and thus Rule 38 is naturally interpreted the same way. Rule 38, like Rule 11, also includes various procedural protections for respondents that are not available under § 1447(c).

V. The Decision Below Properly Balances Policy Considerations.

The Court of Appeals carefully considered the policy implications of construing § 1447(c) to apply to counsel, and the Court concluded that this factor also weighed against Petitioners. As the Court explained, imposing fee awards against counsel could generate collateral litigation at an inopportune time – in the middle of litigation rather than at the end, when most fee-shifting statutes take effect. Pet. A15. Because § 1447(c) gives no guidance as to when courts should hold counsel liable, courts could be asked to adjudicate disputes between lawyers and clients even as the lawyer is supposed to be representing the client on remand. *See id.* Moreover, "[f]orcing an attorney to defend his actions in the midst of litigation might create a conflict of interest . . . or require the attorney to reveal privileged and confidential information." *Id.* And exposing lawyers to liability under the § 1447(c) standard, as opposed to the familiar and more stringent standards of Rule 11 and § 1927, could both chill the right of removal and put a lawyer personally at risk for acting in a representational capacity as an advocate, rather than for committing misconduct. The Court properly concluded that these factors counseled against attorney liability under § 1447(c), especially given the lack of textual support or legislative intent to impose liability on attorneys. The Court, like Congress itself in the legislative history of § 1447(c), recognized that Rule 11, § 1927, and the courts' inherent powers would be available to confine counsel who commit misconduct, including misconduct in removal proceedings. Pet. A17. But

those provisions have never been at issue in this litigation.

VI. Petitioners Have Not Demonstrated a Compelling Reason for Review by this Court.

Petitioners seem not to have contemplated why the decision below is the first appellate case on point, notwithstanding that the removal statute was amended to provide for fee awards more than 20 years ago. The most likely reason is that awards under § 1447(c), unlike awards under § 1988 and many other fee-shifting statutes, tend to be modest. Courts often do not say whether an award of a few thousand dollars for an "improvident removal" under § 1447(c) applies to parties or counsel or both. In these low-stakes affairs, parties and counsel can work that out among themselves, and appeals are uncommon. This case is unusual because of Petitioners' extravagant demand for an award of at least $167,000 directly from counsel, and because the Attorneys and their clients were already at odds for other reasons. Such an unusually large demand impelled the Attorneys to retain their own counsel, to terminate any ongoing relationship with their clients, and to appeal an adverse (preliminary) decision in the Bankruptcy Court. But this case is the rare exception, rather than the rule, and Petitioners provide no explanation for why this long-dormant issue is likely to recur, much less why this Court needs to address an issue that has commanded so little attention in the federal courts. Even if the Court of Appeals' holding had contravened other appellate decisions, or had not followed applicable

precedents of this Court, or had misinterpreted the removal statute's legislative history or intent, or had fashioned a rule in violation of a clear public policy – *all of which is patently untrue* – Petitioners have not demonstrated why this case presents "compelling reasons" for the writ to be granted under the standards set forth in Rule 10.

CONCLUSION

For the reasons stated, respondent William J. Murphy respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

Signed: September 15, 2008
SO ORDERED

/s/
Duncan W. Keir
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
at Baltimore

In re:	)	
	)	Bankruptcy Case No. 07-11598
CRESCENT CITY	)	(United States Bankruptcy
ESTATES, LLC,	)	Court for the Eastern District
	)	of Louisiana)
Debtor.	)	
	)	(Chapter 7)
MR CRESCENT	)	
CITY LLC, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adversary No. 07-00662-DK
	)	
GIANNASCA	)	
CRESCENT	)	
CITY, LLC, *et al.*,	)	
	)	
Defendants.	)	
	)	

ORDER RESOLVING "PRELIMINARY ISSUES" AND
REQUIRING FED. R. CIV. P. RULE 26(f) REPORT

Plaintiffs, MR Crescent City, LLC, McCrary Crescent City, LLC and Michael C. McCrary (collectively, the "Plaintiffs"), have filed their Amended Motion of Plaintiffs MR Crescent City, LLC, McCrary Crescent City, LLC and Michael C. McCrary to Remand Adversary Proceeding and for Attorneys' Fees for Wrongful Removal (Dkt. No. 143) seeking an award of their attorney's fees and related costs (the "Attorney Fee Reimbursement Request") incurred as a result of this adversary proceeding's removal from, and remand to, the Circuit Court for Baltimore City, Maryland. Plaintiffs pursue the Attorney Fee Reimbursement Request against Giannasca Crescent City, LLC, Edward V. Giannasca, II, Crescent City Estates, LLC, Stuart C. (Neil) Fisher, TJ Biscayne Holdings, LLC, Market Street Properties Palm Beach, LLC and Tamara J. Fisher (all of whom were defendants in the adversary proceeding, collectively the "Defendants") and also William J. Murphy and Douglas S. Draper (collectively the "Attorney Respondents").

Counsel for the Plaintiffs and the Attorney Respondents filed a Joint Report in Conformity with Fed. R. Civ. P. Rule 26(f) as Directed by Court Order (Dkt. No. 149) (the "Joint Report", docketed as Dkt. No. 161) which identified certain "Preliminary Issues" which the Attorney Respondents believed were pure legal issues which might be dispositive of the Attorney Fee Reimbursement Request.

Pursuant to this Court's Order Staying Discovery and Setting Deadlines for Points and Authorities (Dkt. No. 166), the Plaintiffs and the Attorney Respondents submitted legal memoranda, and the Court conducted a hearing on September 4, 2008 to

consider "Preliminary Issues" 1 through 3 as described in the Joint Report to determine whether any of the "Preliminary Issues" raised grounds for dismissal of the Attorney Fee Reimbursement Request against the Attorney Respondents and/or to the extent applicable any of the Defendants.

Accordingly, based upon consideration of all of the legal memoranda, the argument in open Court on September 4, 2008 and for the reasons stated in open Court at the conclusion of the hearing, by the United States Bankruptcy Court for the District of Maryland , it is hereby,

1. ORDERED that each of the grounds for dismissal of the Attorney Fee Reimbursement Request set forth in "Preliminary Issues" 1 through 3 is OVERRULED.

2. ORDERED that the Attorney Fee Reimbursement Request is not dismissed against any of the Defendants or the Attorney Respondents.

3. ORDERED that pursuant to Bankruptcy Rule 9014(c), adopting Bankruptcy Rule 7026, this Court expressly directs that Fed. R. Civ. P. 26(f) applies to the Attorney Fee Reimbursement Request.

4. ORDERED that the Plaintiffs, the Defendants and the Attorney Respondents shall file a joint report in compliance with Fed. R. Civ. P. Rule 26(f) no later than October 6, 2008.

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End of Order